

Supreme Court, U. S.
FILED

SEP 13 1978

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

NO. 78-

425

P. C. PFEIFFER CO., INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Of Counsel:

ROYSTON, RAYZOR,
VICKERY & WILLIAMS

E. D. VICKERY
W. ROBINS BRICE
3710 One Shell Plaza
Houston, Texas 77002
Attorneys for Petitioners

SUBJECT INDEX

	<i>Page</i>
Opinions Below	2
Jurisdiction	3
Questions Presented	3
Statute Involved	6
Statement of the Case	7
Reasons for Granting the Writ	10
I. Conflict with the Decisions of this Court	12
II. Conflicts with Other Court of Appeals	18
Statutory Presumption and Judicial Deference	22
Conclusion	25
Appendix A	27
Opinion below on remand, 575 F.2d 79 (5th Cir. 1978)	
Appendix B	29
Order of Remand, 433 U.S. 904 (1977)	
Appendix C	30
Original Opinion below, 539 F.2d 533 (5th Cir. 1976)	
Appendix D	56
<i>Cargill, Inc. v. Powell</i> , 573 F.2d 561 (9th Cir. 1977), <i>pet. for cert. pending</i>	
Appendix E	66
<i>Conti v. Norfolk & Western Ry. Co.</i> , 566 F.2d 890 (4th Cir. 1977)	

LIST OF AUTHORITIES

	<i>Page</i>
<i>Cargill, Inc. v. Powell</i> , 573 F.2d 561 (9th Cir. 1977) ..	11, 18, 19, 20
<i>Conti v. Norfolk & Western Railway Company</i> , 566 F.2d 890 (4th Cir. 1977)	11, 20
<i>Del Vecchio v. Bowers</i> , 296 U.S. 280, 286 (1935)	22
<i>FMC v. Seatrain Lines, Inc.</i> , 411 U.S. 726, 745 (1973) ..	24, 25
<i>I.T.O. Corp. of Baltimore v. Benefits Review Board, et al.</i> , 529 F.2d 1080, 1091 (4th Cir. 1975), modified in banc, 542 F.2d 903 (1976), vacated and remanded, 433 U.S. 904 (1977), opinion on remand, 563 F.2d 646 (4th Cir. 1977)	23

II

CASES	Page
<i>Nacirema Operating Co. v. Johnson</i> , 396 U.S. 212 (1969) ..	12
<i>Noguiera v. New York, N.H. & H.R. Co.</i> , 281 U.S. 128 (1930) ..	11, 12, 17, 20, 21
<i>Northeast Marine Terminal Co., Inc. v. Caputo</i> , 432 U.S. 249 (1977) ..	2, 3, 4, 7, 10, 12, 13, 15, 16, 17, 18, 19, 21, 25
<i>Pennsylvania Railroad Co. v. O'Rourke</i> , 344 U.S. 334 (1953) ..	11, 12, 17, 20, 21
<i>Perdue v. Jacksonville Shipyards, Inc.</i> 539 F.2d 533 (1976) ..	2
<i>Pittston Stevedoring Corp. v. Dellaventura</i> , 544 F.2d 35, 48 (2d Cir. 1976), <i>aff'd sub nom; Northeast Marine Terminal Co. v. Caputo</i> , 432 U.S. 249, 53 L.Ed.2d 320, 97 S.Ct. 2348 (1977) ..	23, 24
<i>Sea-Land Service, Inc. v. Director, O.W.C.P.</i> , 540 F.2d 629 (3d Cir. 1976) ..	23
<i>Southern Pacific Co. v. Jensen</i> , 244 U.S. 205 (1918) ..	18
<i>State Industrial Commission v. Nordenholt</i> , 259 U.S. 263 (1922) ..	17, 18
<i>Stockman v. John T. Clark & Son of Boston</i> , 539 F.2d 264, 269 (1st Cir. 1976, cert. denied, 433 U.S. 908 (1977) ..	22, 24
UNITED STATES STATUTES	
The Longshoremen's and Harbor Workers' Compensation Act:	
33 U.S.C. § 901, et seq.	3
33 U.S.C. § 902(3), 86 Stat. 1251, Section 2(3)	6, 12
33 U.S.C. § 902(4), 86 Stat. 1251, Section 2(4)	6
33 U.S.C. § 903(a), 86 Stat. 1251, 1265, Section 3(a) ..	6
33 U.S.C. § 920	22
RULES OF SPUREME COURT OF UNITED STATES	
Rule 23(5)	7
MISCELLANEOUS	
U. S. Code Congressional and Administrative News 4698, at 4707-4708	6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

NO. 78-

P. C. PFEIFFER CO., INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Petitioners pray that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit entered in these cases on June 16, 1978.

OPINIONS BELOW

Two cases involving identical issues and complementary fact situations under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act are brought to the Court for the second time in this Petition. Both cases were dealt with in a single opinion by the Court of Appeals for the Fifth Circuit, reported sub nom *Perdue v. Jacksonville Shipyards, Inc.*, 539 F.2d 533 (1976), and reprinted as Appendix C to this Petition, *infra*, pages 30 to 55. The Court vacated the judgments based on that 1976 opinion and remanded these cases to the Court of Appeals for the Fifth Circuit for reconsideration in light of the Court's opinion in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977). The Court's Order of Remand is reported at 433 U.S. 904 (1977), and is reprinted as Appendix B to this Petition, *infra*, page 29.

After remand to the Court of Appeals for the Fifth Circuit from the Court, the Court of Appeals reaffirmed its earlier decision based on its prior opinion cited above. The court's brief opinion reaffirming its prior decision is reported at 575 F.2d 79 (5th Cir. 1978), and is reprinted as Appendix A, hereto, *infra*, pages 27 to 28.

These cases had previously reached the Court of Appeals upon petition for review from the administrative tribunals of the United States Department of Labor. In both cases, the Administrative Law Judge found no federal jurisdiction, the Benefits Review Board reversed, and the Court of Appeals for the Fifth Circuit affirmed the Benefits Review Board. The opinion of Administrative Law Judge Vanderheyden in the *Ford* case is not

reported but is printed as Appendix B to the original Petition for Certiorari in these case, No. 76-641, pages 31 to 51.¹ The opinion of the Benefits Review Board of the Department of Labor in *Ford* is reported at 1 BRBS 367, and is reprinted as Appendix C to the original Petition for Certiorari, No. 76-641, pages 52 to 58. The opinion of Administrative Law Judge Devaney in the *Bryant* case is not reported but is reprinted as Appendix D to the original Petition for Certiorari, No. 76-641, pages 59 to 87. The opinion of the Benefits Review Board in *Bryant* is reported at 2 BRBS 408 and is reprinted as Appendix E to the original Petition for Certiorari, No. 76-641, pages 88 to 95.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit on remand from the Court was rendered on June 16, 1978. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

QUESTIONS PRESENTED

1. Whether by the 1972 Amendments to the Longshoremen's Act,² Congress intended to extend the jurisdiction of the Act ashore to categories of non-amphibious, warehouse or terminal workers who satisfy none of the Court's post-amendment criteria for such jurisdiction, as enumerated in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977), because:

1. The Clerk having advised that the printing of these opinions in the Appendix to the Original Petition for Certiorari is sufficient and available to the Court, they are not reprinted here.

2. The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq., was amended October 27, 1972, Public Law 92-576.

- a. Prior to the 1972 Amendments they had, and still have, a uniform compensation system which provides "continuous coverage throughout their employment,"³ and therefore are not subject to the "shifting and fortuitous coverage that Congress intended to eliminate";⁴
- b. They are not "amphibious workers," i.e., not subject to being assigned to work both aboard vessels and on land in the course of their employment;⁵
- c. They never perform any work on navigable waters, and
- d. They never unload (physically remove and store in warehouse) cargo from or load (physically remove from warehouse and place) cargo onto a vessel.

2. Whether employee Bryant meets the "status test" required for Longshoremen's Act jurisdiction when as a "cotton header" (terminal worker) he was unloading cotton bales from a cotton dray wagon and storing them in a pierside warehouse to await the subsequent arrival in port (five days later) of the vessel on which the cotton was to be loaded (physically removed from such storage and placed aboard the vessel) by a stevedoring company completely independent from and unrelated to Bryant's employer?

3. *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, at 273 (1977).

4. *Id.* at 274.

5. *Id.* at 273.

3. Whether the employee Ford meets the "status test" required for Longshoremen's Act jurisdiction when as a member of a warehouse labor gang he was securing a military vehicle onto a railroad car on the dock after the vehicle had been in storage on or near the dock since the time the delivering vessel had sailed (two to seventeen days before), and Ford's employer had in no way participated in the unloading (physical removal from vessel and placing in storage area on dock) of the military vehicle from the vessel?
4. In reaching conflicting results on the basic jurisdictional issue of the extent to which Congress intended to extend the Longshoremen's Act ashore, the various Courts of Appeals also reached conflicting and diverging results on two subsidiary questions which are important to the court's decision below:
 - a. What, if any, weight is to be given to the statutory presumption that a claim comes within the provisions of the Act, 33 U.S.C.A. § 920, which this Court has held to be inapplicable when there is substantial evidence in the record on the facts at issue?⁶
 - b. What, if any, deference is owed by a Court of Appeals to the holdings of the Benefits Review Board on the question of the statutory jurisdiction of the Longshoremen's Act?⁷

6. See full discussion *infra*, p. 22.

7. See full discussion *infra*, p. 23.

STATUTE INVOLVED

The relevant portions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, are as follows:⁸

Section 2(3), 86 Stat. 1251, 33 U.S.C. § 902(3):

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 2(4), 86 Stat. 1251, 33 U.S.C. § 902(4):

The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Section 3(a), 86 Stat. 1251, 1265, 33 U.S.C. § 903 (a):

Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the

8. The sections of the legislative Committee Reports pertaining to shoreside jurisdiction are identical in both the Senate and House of Representatives, and occur in 1972 U. S. Code Congressional and Administrative News 4698, at 4707-4708.

United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). * * *

STATEMENT OF THE CASE

In 1977, this Court rendered its first decision interpreting the 1972 shoreside extension of Longshoremen's Act jurisdiction.⁹ The present two cases¹⁰ were pending in this Court at that time. After its decision in *Caputo*, this Court vacated the judgments of the Court of Appeals in these cases and remanded them for reconsideration in light of *Caputo*.¹¹

Petitioners are employers¹² of persons who work in the dockside areas adjoining navigable waters. The respondent employees are workers who sustained injuries while transferring bulk cargo to or from land transportation in a shoreside storage area.¹³ At the time of his injury,¹⁴

9. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 53 L.Ed.2d 320, 97 S.Ct. 2348 (1977).

10. Two cases presenting complementary fact situations (loading/unloading) were decided together by the court below and have been brought to this Court in a single petition. Rule 23(5), Rules of the Supreme Court of the United States.

11. 433 U.S. 904 (1977), Appendix B, *infra*, p. 29.

12. And their compensation insurance carrier.

13. It is not disputed that both accident sites were geographically in cargo handling areas adjoining navigable waters.

14. April 12, 1973 at the Port of Beaumont, Texas. The Administrative Law Judge below made full fact findings based on stipulations, and these fact findings are reprinted in his opinion below. App. p. 33 in No. 76-641. Petitioners have accordingly not deemed it necessary to reprint at this time the stipulations from the record below.

Respondent Ford was standing on a railroad flatcar securing a military vehicle for carriage to an inland arsenal. The military vehicle had been returned to the United States on a ship and had been stored in an open, shoreside storage area pending its on-carriage by rail. The ship which delivered the military vehicle had departed prior to the day of the accident,¹⁵ and Ford and his co-workers were hired from the Warehousemen's Local Union of the International Longshoremen's Association to secure the military vehicles on the railcars. No ship was at the dock, and in any event, the applicable labor contract would have prohibited these workers from the Warehousemen's Local Union from working aboard ships or assisting in the movement of cargo directly to or from ships.

Respondent Bryant¹⁶ was injured while standing on a cotton dray wagon utilized to bring cotton bales from the compress company to a shoreside warehouse for eventual shipment overseas. He was assisting the wagon driver in unloading the bales from the wagon and "heading" them into a storage location in the pier-side warehouse. The cotton bales being handled were subsequently loaded aboard a ship which arrived in port five days after Bryant's injury. Petitioner (Bryant's em-

15. The military vehicles being loaded that day had arrived on one of two ships, and had been unloaded from the ship and placed in the storage area either two or seventeen days before Ford's accident. The Petitioner (Ford's employer) had not participated in any way in the unloading of either of the ships.

16. May 2, 1973, at the Port of Galveston, Texas. The Administrative Law Judge below made full fact findings based on the stipulations, and these fact findings are reprinted in his opinion below. App. p. 62 in No. 76-641. Petitioners have accordingly not deemed it necessary to reprint at this time the stipulations from the record below.

ployer) performs no ship loading or unloading work at any time, and the bales in question were eventually loaded aboard ship (physically removed from warehouse and placed aboard ship) by a stevedoring company completely unrelated to Bryant's employer. In fact Bryant's employer never loaded or unloaded any vessels.¹⁷ Neither Ford nor Bryant satisfies any of the four criteria on which the Court relied in holding Caputo covered: (1) Neither was a member of a regular stevedoring gang who "participated on either the pier or the ship in the stowage and unloading of cargo".¹⁸ (2) Both were hired as terminal or warehouse laborers and were not subject to being assigned to load or discharge vessels. (3) Both were aware of their work assignments being limited to warehouse work and not subject to being changed during the day. (4) Both had a perfectly uniform compensation system (state law) which covered all of their work activities both before and after the 1972 amendments to the Longshoremen's Act. These are the four factors on which the Court relied in finding "amphibious workers" such as Caputo to be engaged in maritime employment and therefore covered by the Longshoremen's Act, even though not engaged in "long-shoring operations" but in the "old fashioned process of putting goods already unloaded from a ship or container into a delivery truck".¹⁹ Upon remand, the Court below obviously did not consider these four factors to

17. Bryant's employer does have some employees who do go aboard ship in the course of their ship agency duties, but the applicable labor contract pursuant to which Bryant was hired precludes Bryant or any other "cotton header" from doing so.

18. 432 U.S. at 273.

19. Id. at 272.

be of any significance (since none was present in Bryant or Ford), and adhered to its earlier holding that all work which is "an integral part of the process of moving maritime cargo from ship to land transportation" or vice versa is covered if performed in an area meeting the "situs test."²⁰ Thus, these two cases squarely present the ultimate question which the Court declined to reach in *Caputo*:

Whether the Longshoremen's Act, as amended in 1972, covers "all physical cargo handling activity anywhere within an area meeting the situs test"²¹ or only those "amphibious workers" such as Caputo who had no uniform compensation remedy prior to the 1972 Amendments?

REASONS FOR GRANTING THE WRIT

1.

In its prior opinion and current decisions in these cases, the court below has specifically adopted the position urged by the Director, Office of Workers' Compensation Programs, but declined by the Court in its *Caputo* opinion, and in doing so, its decisions are in direct conflict with:

1. The "status test" standards for Longshoremen's Act jurisdiction ashore applied by the Court in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977); and with the historical

20. 539 F.2d 533, at 543; Appendix C, *infra*, p. 30, at 47.

21. The position asserted by the Director of the Office of Workers' Compensation Programs before the Court in *Caputo*, 432 U.S. at 272 and Footnote 34.

definition of "maritime employment" under the Act in *Pennsylvania Railroad Co. v. O'Rourke*, 344 U.S. 334 (1953) and *Noguiera v. New York, N.H. & H.R. Co.*, 281 U.S. 128 (1930).

2. The opinion of the Court of Appeals for the Ninth Circuit in *Cargill, Inc. v. Powell*, 573 F.2d 561 (9th Cir. 1977), Petition for Certiorari pending, No. 77-1543, *Powell v. Cargill, Inc., et al*, which is reprinted as Appendix D to this Petition, *infra*, pages 56 to 65.
3. The opinion of the Court of Appeals for the Fourth Circuit in *Conti v. Norfolk & Western Railway Company*, 566 F.2d 890 (4th Cir. 1977), which is reprinted as Appendix E to this Petition, *infra*, pages 66 to 77.

2.

These conflicts pertain to the most important question of the statutory jurisdiction ashore of the Longshoremen's Act as amended in 1972 and require prompt and authoritative resolution by the Court. The Solicitor General has expressly acknowledged and noted both the conflict with the Ninth Circuit's decision in *Powell* and the importance of the issue in his Memorandum For Federal Respondent related to the Petition for Certiorari in the *Powell* case.²² In so doing the Solicitor General has urged that this Petition be considered together with *Powell*, and that this Court grant review in these cases to resolve the conflict on this "important issue which has divided two major deep water circuits."²³ Apart from the conflict with the

22. No. 77-1543, *Powell v. Cargill, Inc., et al*, Memorandum For Federal Respondent, page 4, 5.

23. *Id.*, at page 5.

Ninth Circuit (and the Fourth Circuit as well), the importance of the issue is perhaps best demonstrated by the fact that since the 1972 Amendments more than 50% of all injuries reported under the Longshoremen's Act have been based on the Act's extension ashore and clearly would not have been covered prior to the 1972 Amendments because the Act's jurisdiction stopped at the water's edge.²⁴

I. Conflict with the Decisions of this Court.

A.

The holding of the court below that injured employees, Bryant and Ford, were engaged in "maritime employment" at the time of their injuries is directly in conflict with the Court's recent decision in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977), and with the Court's earlier decisions in *Pennsylvania Railroad Co. v. O'Rourke*, 344 U.S. 334 (1953), and *Noguiera v. New York, N.H. & H.R. Co.*, 281 U.S. 128 (1930).

In its *Caputo* opinion, the Court discussed the "maritime employment" requirement of Section 2(3) of the Longshoremen's Act, as amended in 1972. The Court recognized that the 1972 amendments created a dual situs/status test for coverage, and that the 1972 amendments made it "necessary to describe affirmatively the class of workers Congress desired to compensate."²⁵ For break-bulk cargo handlers such as Caputo, Ford, and Bryant, the Court analyzed the status question in terms of the dominant Congressional theme calling for a "uni-

form compensation system" to apply to employees who would otherwise be covered by this Act for part of their activity.²⁶ The Court found it clear that Congress "had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations and who, without the 1972 amendments, would be covered for only part of their activities."²⁷ *Caputo* was held to be such a person because

" . . . as a member of a regular stevedoring gang, he participated on either the pier or the ship in the stowage or unloading of cargo. On the day of his injury he had been hired by petitioner *Northeast* as a terminal laborer. In that capacity, he could have been assigned to any one of a number of tasks necessary to the transfer of cargo between land and maritime transportation, including stuffing and stripping containers, loading and discharging lighters and barges, and loading and unloading trucks. Not only did he have no idea when he set out in the morning which of these tasks he might be assigned, but in fact the assignment could have changed during the day. Thus, had Caputo avoided injury and completed loading the company's truck on the day of the accident, he then could have been assigned to 'unload a lighter. . . . Since it is clear that he would have been covered while unloading such a vessel, to exclude him from the Act's coverage in the morning but include him in the afternoon would be to revitalize the shifting and fortuitous coverage that Congress

26. 432 U.S. at 272. The Court recognized the irrelevancy to break bulk cargo handlers of the other primary motivation for the extension of the Act's jurisdiction ashore when it said: "The Congressional desire to accommodate the Act to modern technological changes is not relevant to Caputo's case, since he was injured in the old fashioned process of putting goods already unloaded from a ship * * * into a delivery truck." 432 U.S. at 271, 272.

27. 432 U.S. at 272.

24. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969).

25. 432 U.S. at 264.

intended to eliminate." (Emphasis supplied). 432 U.S. at 273-274.

By way of contrast, Bryant not only had no regular employment as a longshoreman (member of a stevedore gang loading or unloading ships), he had had no employment in "indisputably longshoring operations"²⁸ for at least five years prior to his injury! His work assignment "could (not) have changed during the day"—he absolutely could not have done ship loading or unloading work because his employer never loaded or unloaded vessels. He knew exactly the type of work he was employed for on any given day and knew he could not possibly be assigned to longshore work "on either the pier or the ship in the stowage or unloading of cargo." There was absolutely no possibility that his compensation coverage could shift during his work day. Both before and after 1972 he had a uniform compensation remedy under Texas law and could not possibly have come within the federal coverage "without the amendments," because he could not possibly have performed any of his work on the navigable waters in the course of his occupation as a cotton header.

Nor is Ford's employment pattern at all like Caputo's. During the year prior to his injury Ford worked for a beer distributing company, for a shoreside construction company, a total of 39 days as a warehouseman on the docks and only seven days as a longshoreman. This is in no way comparable to Caputo who was a member of a regular stevedoring gang. Additionally, Ford could not have been assigned aboard a vessel or to assist in loading or unloading a vessel, for he was working out of the Ware-

28. Id. at page 272.

houseman's Local Union under the warehouseman's contract which expressly prohibited any such reassignment. He knew, when he hired out of the Warehouseman's Union Hall, that he could not be assigned to load or unload a ship. Like Bryant, and unlike Caputo, there was no possibility that his compensation coverage would shift or change because he had an absolutely uniform compensation remedy, and "without the amendments" he could never be covered by the Longshoremen's Act for any part of his activity.

Thus neither Ford nor Bryant is an amphibious worker "like Caputo," and neither is nor could be subject to the "shifting and fortuitous coverage that Congress intended to eliminate."²⁹ They are not "persons like Caputo" and they are not "in maritime employment" as that status requirement is analyzed by the Court in *Caputo*.

In light of these undisputed facts, the holding of the court below on remand that its prior opinion was "consistent with the rationale" of the Court in *Caputo* is unfathomable. The court below attached no significance to any of the factors on which the Court relied in holding *Caputo* to be covered. It completely ignored the undisputed fact that neither worker was subject to any shifting coverage and that both had the same uniform compensation remedy they had had prior to the 1972 Amendments. Instead, the court below considered only whether the work "was an integral part of the ongoing process of moving cargo between land transportation and a ship," (Bryant)³⁰ or "from a ship to land transportation"

29. Id.

30. 539 F.2d 534 at 544; Appendix C, *infra*, page 50.

(Ford).³¹ Thus, the court below embraces in full the view of the Director, Office of Workers' Compensation Programs, that the post-amendment coverage should reach "all physical cargo handling activity anywhere within an area meeting the situs test," or, as also stated in another way by the Director, "all physical cargo tasks performed on the waterfront and particularly those tasks necessary to transfer cargo between land and water transportation."³² The Director's position and that of the court below effectively eliminate the maritime employment status test to which *Caputo* was directed in its entirety and makes situs only the test—a result Congress never intended.

The opinion of the Court below also directly conflicts with the Court's recognition in *Caputo* that "employees such as truck drivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered".³³ The broad maritime employment status test of the Court below (and of the Director) would cover the driver of the cotton dray wagon who was helping Bryant remove the cotton bale from land transportation at the time of the injury, another clear and irreconcilable conflict with *Caputo*.

31. *Id.* at page 543; *infra*, page 47.

32. 432 U.S. at 272.

33. *Id.* at page 267. The Court makes this even more clear in footnote 37: "In addition, we reiterate that *Caputo* did not fall within the excluded category of employees 'whose responsibility is only to pick up stored cargo for further trans-shipment.' *Sen. Rep.*, at 13; *H. Rep.*, at 11. As we indicated *supra*, at 16-17, that exclusion pertains to workers, such as the consignees' truck drivers *Caputo* was helping, whose presence at the pier or terminal is for the purpose of picking up cargo for further shipment by land transportation." 432 U.S. at 274.

As the Court emphasized in *Caputo*, Congress set out to solve a uniformity problem when workers went back and forth across the water's edge during the course of a day's work. No such uniformity problem existed in 1972, and none exists now, as to persons such as Ford and Bryant whose assignments cannot cross the water's edge—their remedy remains unchanged and uniform throughout their work—the Workmen's Compensation Act of Texas. The opinion of the Court of Appeals below conflicts with the Court's refusal to adopt the Director's broad interpretation of the 1972 Amendments, and this Petition for a Writ of Certiorari should be granted to resolve this conflict.

B.

The second area of conflict with the Court's decisions lies in the area of the historical definition of the term "maritime employment," in the Longshoremen's Act as established in the Court's opinions in *O'Rourke*,³⁴ and *Noguiera*.³⁵ In *Noguiera*, the Court held that a railroad employee loading freight into railroad cars on a car float on navigable waters was in "maritime employment" as that term was used in the Act only because his work on the day of the accident was upon navigable waters in New York harbor.³⁶ In *O'Rourke*, the Court reaffirmed

34. *Pennsylvania Railroad Co. v. O'Rourke*, 344 U.S. 334 (1953).

35. *Noguiera v. New York, N.H. & H. R. Co.*, 281 U.S. 128 (1930).

36. The Court also pointed out that this meaning of the term maritime employment was completely consistent with holdings of the Court prior to passage of the Longshoremen's Act, as in *State Industrial Commission v. Nordenholt*, 259 U.S. 263 (1922), that maritime employment for purposes of workmen's compensation laws

that this was the meaning of "maritime employment" as that term was used in the Act in the definition of employers to be covered by the Act.

The Court's decision in *Caputo* is also completely consistent with this historical definition of maritime employment in its requirement that a covered employee be subject to being assigned to work either on a vessel (navigable waters) or on the dock on the day of his accident. The decision of the court below is in direct conflict with this definition and this Petition should be granted to resolve the conflict.

II. Conflicts With Other Courts of Appeals.

A.

The Court should grant this petition to resolve the direct and irreconcilable conflict between the decision of the court below and the decision of the Court of Appeals for the Ninth Circuit in *Cargill, Inc. v. Powell*, 573 F.2d 561 (9th Cir. 1977), Petition for Certiorari pending.³⁷ In *Powell*, the Ninth Circuit held that a grain elevator employee whose duties were to unload grain from a railcar into a shoreside elevator from which it

did not include dockside cargo handling activities performed solely on the dock. In *Nordenholt*, the employee was stacking sacks of cement on the dock as they were being discharged from the ship, and the state court of New York had held that the maritime exclusivity doctrine of *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), precluded any state workmen's compensation remedy. The Court reversed on the basis that dockside cargo handling activities were not maritime employment, and thus there was no need to be concerned with the application of a uniform maritime law to such non-maritime employment, i.e. employment performed solely on the dock.

37. No. 77-1543, *Powell v. Cargill, Inc., et al.*

would be loaded into a vessel was not engaged in "maritime employment" and therefore not covered by the Longshoremen's Act. Powell was in precisely the same position with respect to the grain cargo as Bryant was to the cotton bales in the *Bryant* case. Both were unloading maritime cargo from shore transportation into a shoreside storage facility where it was stored to await eventual loading aboard a ship.³⁸ The Court below held that Bryant was covered by the Longshoremen's Act. The Ninth Circuit held that Powell was not covered by the Longshoremen's Act.

As previously indicated, the Solicitor General has acknowledged and asserted that *Powell* is in conflict with these *Bryant* and *Ford* cases in his "Memorandum For The Federal Respondent" on the still pending Petition For A Writ of Certiorari in *Powell*.³⁹ The only difference which the Solicitor General suggests is his allegation that Powell was a "longshoreman by trade, and Ford and Bryant were not."⁴⁰ While this is disputed by the Respondent Cargill, it demonstrates dramatically the absolute and irreconcilable conflict of *Ford* and *Bryant* with the Court's decision in *Caputo*. *Ford* and *Bryant* are not longshoremen by occupation or in any other sense of the word!

These three cases are in clear conflict, and squarely raise the most important question left unresolved by the Court in *Caputo*:

38. Likewise, *Ford* was in precisely the same position as Powell and Bryant, except he was loading maritime cargo onto land transportation rather than unloading it from land transportation.

39. No. 77-1543, *Powell v. Cargill, Inc., et al.*, Memorandum For Federal Respondent, page 4, 5.

40. *Id.*, page 5.

Whether all cargo handling activities in a shore-side area are covered by the Longshoremen's Act as amended in 1972.

The Petition should be granted to resolve this conflict.

B.

The second significant conflict with a recent decision of another Court of Appeals is with *Conti v. Norfolk & W. Ry. Co.*, 566 F.2d 890 (4th Cir. 1977). Like Bryant, Conti and his fellow workers were transferring cargo from land transportation to a shoreside facility from which it was to be loaded onto a vessel. The several tasks involved were directed to dumping coal from a railcar into a shoreside terminal area for the purpose of permitting the coal to be loaded aboard a ship. This is directly equivalent to the work Bryant was doing and conversely equivalent to Ford's work fastening cargo onto a railroad car. The Fourth Circuit held that Conti and his co-workers "were engaged in unloading a coal train, not loading a vessel." 566 F.2d at 895. Thus, the Fourth Circuit's decision is in accord with that of the Ninth Circuit in *Powell*.

The *Conti* case is a dramatic illustration of the conflict between the principles of Longshoremen's Act jurisdiction adopted by the Fifth Circuit below and the *O'Rourke* and *Nogueira* principles of the Court discussed above. The *Conti* workers were unloading railcars at a waterfront terminal facility. If the 1972 Amendments extended Longshoremen's Act coverage to these workers, as the Director's and Fifth Circuit's test would do,⁴¹ then this

41. The Director, OWCP, would reach "all physical cargo handling activity anywhere within an area meeting the situs [test],"

Court's opinions in *O'Rourke* and *Nogueira* would require that the Longshoremen's Act be Conti, et al's exclusive remedy in derogation of the FELA railroad employee remedy. This exclusivity defense was the issue treated in *Conti*, but the Court of Appeals avoided the overlapping jurisdiction problem by holding that Conti's work unloading shore transportation was not maritime employment and therefore not within the jurisdiction of the Longshoremen's Act. The court looked to the "basic fact that the plaintiffs were engaged in unloading a coal train, not loading a vessel." 566 F.2d at 895. It is this "basic fact" that the Fifth Circuit (and the Director) has overlooked in the Ford and Bryant cases below: Ford was loading a railroad car, Bryant was unloading a dray wagon. Like Conti, Ford and Bryant did not have traditionally maritime occupations as described in *Caputo* and *O'Rourke*. Under *Conti*, the Fourth Circuit would hold Ford and Bryant not covered by the Longshoremen's Act. The Fifth Circuit in the opinion below has held that they are covered, as would the Director's status test. This petition should be granted to resolve this clear conflict between the circuits, especially in view of the important implications for FELA coverage illustrated by the *Conti* case.⁴²

including "all physical tasks performed on the waterfront, and particularly those tasks necessary to transfer cargo between land and water transportation." *Caputo, supra*, 432 U.S. at 272, 53 L.Ed.2d at 338. The Court below looked to whether the task was "an integral part of the ongoing process of moving cargo between land transportation and a ship." 539 F.2d at 544, App. p. 50.

42. The Fourth Circuit observed that Congress did not intend to supplant FELA remedies with Longshoremen's Act remedies, 566 F.2d at 895. Indeed not, and this illustration of unconsidered overlaps in jurisdiction demonstrates that Congress did not intend to extend Longshoremen's Act jurisdiction beyond the problem of non-uniform coverage for which a solution was sought.

STATUTORY PRESUMPTION AND JUDICIAL DEFERENCE

In reaching its decision below, the Court of Appeals relied on two principles of decision which have been discredited and rejected by other courts of appeal in similar shoreside jurisdiction cases—employment of a statutory presumption in spite of a full evidentiary record and judicial deference to the Benefits Review Board on a question of interpreting the statutory jurisdiction of the Act.

This Court has long held the statutory presumption, 33 U.S.C.A. § 920, to be inapplicable when an evidentiary record on the issue is present. *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935). The Administrative Law Judges below both found that substantial evidence existed on the jurisdiction issue. *Ford*, App. p. 50 in No. 76-641; *Bryant*, App. p. 86 in No. 76-641, and the court below should not have employed the presumption at all.

As a result, a clear conflict also exists among the Courts of Appeals with regard to the statutory presumption that a claim comes within the provisions of the Act. The court below considered itself "bound by a statutory presumption that an individual claim comes within the Act's coverage." 539 F.2d at 541, App. pp. 42-43. In contrast, a First Circuit panel said the basic interpretative decision concerning the jurisdictional applicability of the Act "must precede any application of the presumption." *Stockman v. John T. Clark & Son of Boston*, 539 F.2d 264, 269 (1st Cir. 1976), cert. denied, 433 U.S. 908 (1977). The Court of Appeals for the Second Circuit also stressed the inapplicability of the presump-

tion to "an interpretation question of general import" such as the jurisdiction of the Act, *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 48 (2d Cir. 1976), *aff'd sub nom Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 53 L.Ed.2d 320, 97 S.Ct. 2348 (1977), while a Third Circuit panel wrote a jurisdiction opinion but apparently did not rely on or even mention the presumption at all. *Sea-Land Service, Inc. v. Director, O.W.C.P.*, 540 F.2d 629 (3d Cir. 1976). Finally, the opinion adopted in principle by the majority of the Court of Appeals for the Fourth Circuit sitting in banc is criticized by Judge Craven in dissent for its failure to give "sufficient weight, if any," to the statutory presumption. *I.T.O. Corp. of Baltimore v. Benefits Review Board, et al*, 529 F.2d 1080, 1091 (4th Cir. 1975), modified in banc, 542 F.2d 903 (1976), vacated and remanded, 433 U.S. 904 (1977), opinion on remand, 563 F.2d 646 (4th Cir. 1977). Thus the four other Courts of Appeals which have dealt with the jurisdiction of the amended Act in this context have not been constrained by the statutory presumption, while the court below said it was "bound" in its deliberations by that self-same presumption. A writ of certiorari in these cases should issue to correct the erroneous approach of the court below in its approach to fundamental jurisdictional questions.

A similar conflict exists with regard to judicial deference in this context. How much deference is owed by a Court of Appeals to the Benefits Review Board of the Department of Labor with regard to a fundamental question of statutory interpretation involving the extension of federal jurisdiction? The Courts of Appeals for the

First⁴³ and Second Circuits⁴⁴ have explicitly declined to defer to the Benefits Review Board, doubting any superiority of the administrative agency in matters of statutory interpretation⁴⁵ and criticizing the cursory treatment afforded by the Board to this important question.⁴⁶ By way of contrast, the court below explicitly declined to look beyond the Board's decision "so long as there is a reasonable legal basis for the Board's conclusions [citations omitted]" (539 F.2d at 541, App. p. 43). Indeed, in the *Bryant* case, the court specifically limited its analysis:

"Also, we are bound to respect the Board's conclusions if they are supported by the record and if they have a reasonable legal basis. In view of the limited nature of our review, we cannot say that the Board erred in defining Bryant's work status." 539 F.2d at 544, App. p. 49.

Contrast the First Circuit statement in *Stockman* that "as the focus is upon the meaning of the statute, the judgment must be our own, not the Board's." 539 F.2d at 270. Even more significantly, the Court of Appeals for the Second Circuit in *Dellaventura* quoted this Court for the proposition that an "agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate" *FMC v. Sea-*

43. *Stockman v. John T. Clark & Son of Boston*, 539 F.2d 264 (1st Cir. 1976), cert. denied 433 U.S. 908 (1977).

44. *Pittston Stevedoring Company v. Dellaventura*, 544 F.2d 35, (2d Cir. 1976), *aff'd sub nom Northeast Marine Transport Co. v. Caputo*, 432 U.S. 249 (1977).

45. *Stockman*, *supra* n. 43, 539 F.2d at 269.

46. *Pittston*, *supra* n. 44, 544 F.2d at 47.

train Lines, Inc., 411 U.S. 726, 745 (1973)," and "therefor reject[ed] the argument that the BRB's decisions in these cases must be affirmed if they are rational but wrong." 544 F.2d at 50. It is just such a "bootstrap" operation in which the Board has been engaged and to which the court below has given deference, and this Court should grant a writ of certiorari in these cases to correct this error and to establish the proper standard of judicial review of Benefits Review Board interpretation of the jurisdictional provisions of the Longshoremen's Act.

CONCLUSION

In view of the conflict of the decisions and opinion below with the prior decisions of the Court and with the contemporaneous decisions of various Courts of Appeals, and particularly in order to resolve authoritatively the extent to which the Longshoremen's Act Amendments of 1972 extended federal jurisdiction ashore, Petitioners respectfully pray that this Court grant a writ of certiorari and reverse the decisions of the court below.

Respectfully submitted,

E. D. VICKERY
W. ROBINS BRICE
3710 One Shell Plaza
Houston, Texas 77002
Attorneys for Petitioners

Of Counsel:

ROYSTON, RAYZOR,
VICKERY & WILLIAMS

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

NO. 78-

P. C. PFEIFFER CO., INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

and

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX A

**JACKSONVILLE SHIPYARDS, INC., and
Aetna Casualty & Surety Company, Petitioners,**

v.

**Herbert L. PERDUE and Director, Office of Workers'
Compensation Programs, United States Department
of Labor, Respondents.**

**P. C. PFEIFFER COMPANY and
Texas Employers' Insurance Association, Petitioners,**

v.

**Diverson FORD and Director, Office of Workers'
Compensation Programs, United States Department
of Labor, Respondents.**

**AYERS STEAMSHIP COMPANY and
Texas Employers' Insurance Association, Petitioners,**

v.

**Will BRYANT and Director, Office of Workers'
Compensation Programs, United States Department
of Labor, Respondents.**

Nos. 75-1659, 75-2289 and 75-4112.

**UNITED STATES COURT OF APPEALS,
Fifth Circuit.**

June 16, 1978.

575 F.2d 79

**Petitions for Review of Orders of the Benefits Review
Board.**

Before TUTTLE, THORNBERRY and TJOFLAT,
Circuit Judges.*

PER CURIAM:

These Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1970) (amended 1972), cases¹ are on remand from the Supreme Court with instructions to reconsider them in light of *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977). We find that our prior resolution of the coverage issues presented in each of these cases is consistent with the rationale expressed in *Caputo*, and, accordingly, we reaffirm our prior determinations as to the benefit eligibility of the affected maritime employees under the Act.

APPENDIX B

NO. 76-641

P. C. PFEIFFER COMPANY, INC., ET AL.,
Petitioners,

v.

DIVERSON FORD ET AL.

433 U.S. 904, 53 L.Ed.2d 1088, 97 S.Ct. 2966.

June 27, 1977

On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Petition for writ of certiorari granted, judgments vacated and case remanded to the Court of Appeals for further consideration in light of *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 53 L.Ed.2d 320, 97 S.Ct. 2348 (1977).

Same case below, 539 F.2d 533.

* Judge Thornberry was a member of the panel that heard oral arguments but due to illness did not participate in this decision. 28 U.S.C. § 46(d) (1970).

1. Five cases are contained in the decision of this court in *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533 (5th Cir. 1976). The three cases involved in the present remand are *Jacksonville Shipyards, Inc. v. Perdue* (No. 75-1659), *vacated and remanded*, 433 U.S. 904, 97 S.Ct. 2967, 53 L.Ed.2d 1088 (1977); and *Ayers Steamship Co. v. Bryant* (No. 75-4112), which was consolidated with *P. C. Pfeiffer Co. v. Ford* (No. 75-2289), *vacated and remanded*, 433 U.S. 904, 97 S.Ct. 2966, 53 L.Ed.2d 1088 (1977).

APPENDIX C

JACKSONVILLE SHIPYARDS, INC.,
and Aetna Casualty & Surety Company, Petitioners,
v.

Herbert L. Perdue and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

JACKSONVILLE SHIPYARDS, INC.,
and Aetna Casualty & Surety Company, Petitioners,
v.

Charles W. SKIPPER and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

P. C. PFEIFFER COMPANY and
Texas Employers' Insurance Association, Petitioners,
v.

Diverson FORD and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

HALTER MARINE FABRICATORS, INC.,
and Fidelity & Casualty of New York, Petitioners,
v.

John L. NULTY and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

AYERS STEAMSHIP COMPANY and
Texas Employers' Insurance Association, Petitioners,
v.

Will BRYANT and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

NOS. 75-1659, 75-2833, 75-2289
75-2317 and 75-4112

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

September 27, 1976.

Proceeding was brought to review awards to five shore-side workers, who were injured in course of their employment, under 1972 Amendments to Longshoremen's and Harbor Workers' Compensation Act by Benefits Review Board. The Court of Appeals, Tjoflat, Circuit Judge, held that Board properly awarded benefits to two workers who were handling maritime cargo on shore as well as to a carpenter who was fabricating parts for a new ship, but that Board misconstrued Act in extending coverage to shipboard worker who stumbled in front of his employer's office a mile from ship and to employee who was helping to tear down shed in disused marine repair facility; and that Congress, which could reasonably have felt that shipbuilding employees beside navigable waters were performing sufficiently maritime function to be covered by harbor workers' compensation statute, did not exceed its broad discretion by extending coverage to such work.

Affirmed in part and reversed in part.

* * *

Petitions for Review of Orders of the Benefits Review Board, United States Department of Labor.

Before TUTTLE, THORNBERRY and TJOFLAT.
Circuit Judges.*

* Judge Thornberry was a member of the panel that heard oral arguments but due to illness did not participate in this decision. 28 U.S.C. § 46(d)(1970).

TJOFLAT, Circuit Judge.

I

AN OVERVIEW OF THESE CASES

The Parties and Their Dispute. With these five vigorously contested appeals, petitioners and respondents join battle for the third time. Each individually named respondent is a shoreside worker who was injured in the course of his employment. These respondents claim that their injuries are covered by the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act (the Act), 33 U.S.C. §§ 901 *et seq.* (1970). In their fight for coverage, the workers have a new and virtually untested weapon, *viz.*, those portions of the 1972 Amendments which expanded the scope of the Act.¹ They also have a powerful and articulate ally in the other respondent, the Director of the Office of Workers' Compensation Programs of the United States Department of Labor (the Director).² The forces arrayed against respondents consist of the workers' employers and the employers' insurance carriers.

1. Especially pertinent are new Sections 902(3) (definition of "employee"), 902(4) (definition of "employer"), and 903(a) (expanded situs provision in new Act). Despite the fact that more than three years have passed since the Amendment's effective date, litigation over the Act's new coverage is just now beginning to reach the courts. *See Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975). *See also I.T.O. Corp. v. Benefits Review Bd.*, 529 F.2d 1080 (4th Cir. 1975), *rehearing en banc granted* (4th Cir. Mar. 12, 1976).

2. As shall appear *infra*, there is a dispute as to whether the Director is a proper party respondent in this Court, or whether his status is merely that of *amicus curiae*. In Part V of this opinion, we hold that the Director is a proper respondent.

Procedural History. In each of the cases, a preliminary skirmish was fought before an Administrative Law Judge.³ Reports from these battlefields show mixed results; petitioners won three of the engagements, and respondents two. The theater of operations then shifted to the Washington, D.C., headquarters of the Benefits Review Board of the Department of Labor (the Board).⁴ The Board adopted an extremely liberal view of the Act's coverage, and respondents swept to victory in all five cases. After losing the fight in Washington, D.C., petitioners chose to escalate the conflict by asking this Court to review the Board's decisions.⁵

The Issues on Appeal. Before this Court, the lines of battle have been drawn with admirable clarity and good sense. Both sides have declined to assume certain exposed legal positions where they would quickly fall prey to the enemy's fire. Thus, respondents concede that the five accidents would not have been covered by the pre-1972 Act. Similarly, petitioners concede that the 1972 Amendments have broadened the Act's scope to include *some* shoreside injuries. The issue which divides the two camps

3. New Section 919(d) provides that evidentiary hearings shall be held before hearing examiners. The administrative regulations relating to the Amendments make it clear that such hearing examiners are to be Administrative Law Judges. *See* 20 C.F.R. § 702.332 (1975).

4. Pursuant to Section 921(b)(3) of the new Act, the Benefits Review Board is authorized to hear appeals by any party in interest from the Administrative Law Judge's orders. The Board must base its decision upon the hearing record and is bound by a "substantial evidence" standard in its review of findings of fact. *Id.*

5. Jurisdiction over these appeals is conferred upon us by Section 921(c) of the new Act. Thereunder, a party aggrieved by a final order of the Board may obtain review of that order in the Court of Appeals for the federal judicial circuit in which the employee's injury occurred.

is, of course, whether the Act was expanded far enough to reach *these* five injuries. We hold that the Board properly awarded benefits to two workers who were handling maritime cargo on shore, as well as to a carpenter who was fabricating parts for a new ship. However, the Board misconstrued the Act in extending coverage to the other two respondents, a shipboard worker who stumbled in front of his employer's office a mile from the ship, and an employee who was helping to tear down a shed in a disused marine repair facility.

Not content with merely jousting over the scope of the revised Act, three of the petitioners have broken ranks to seek out other *casus belli*. The petitioners in the *Halter Marine* case argue that the Act is unconstitutional if it covers injuries to shipbuilders on shore. In *Pfeiffer*, we are told that the Board violated the petitioners' right to due process by the method in which it awarded a fee to the claimant's attorney. The *Ayers Steamship* petitioners enter the lists with a plan to split the enemy forces; they claim that the Director is not a proper respondent in these appeals. As will hereinafter appear, we reject all of these additional contentions.

II

SCOPE OF THE 1972 AMENDMENTS

Of the many changes which Congress made in the Act in 1972, we are here concerned with only one: the extension of the Act's coverage inland to reach certain maritime-related injuries. Under the prior Act, coverage was overwhelmingly situs-oriented. As a general rule, an employee's injury was compensable if it occurred "upon the navigable waters of the United States (including any dry

dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law . . .".⁶ Interpretation of this provision was immensely complicated by a judicially created doctrine under which some "maritime but local" injuries could be covered by both state and federal compensation schemes. *See, e.g., Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed.2d 368 (1962); *Davis v. Department of Labor*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246 (1942). However, the Supreme Court made it clear that, whatever the exact parameters of the "maritime but local" doctrine, the federal Act would generally be confined to injuries occurring over the waters. Thus, in *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 90 S.Ct. 347, 24 L.Ed.2d 371 (1969), the Court held that the Act did not cover injuries to longshoremen who were working on a pier permanently affixed to the shore. Coverage was denied despite the fact that the workers had been injured while loading and unloading ships, an employment as maritime in nature as any land-based employment could be.⁷ The inequities of this "water's edge" division between covered and noncovered work were a major factor behind the decision to expand the scope of the Act.⁸

6. See former 33 U.S.C. § 903(a). There were certain exemptions from coverage, all of which have been carried over into the new Act. See *id.*, as amended, § 903(a)(1) (masters and crew members; persons engaged by masters to service vessels under eighteen tons net); *id.*, § 903(a)(2) (government employees); *id.*, § 903(b) (injuries caused solely by the employee's intoxication or willful conduct).

7. Further underscoring the maritime context of these injuries was the fact that the injuries were caused by ships' cranes which had swung out of control. 396 U.S. at 213-14, 90 S.Ct. 347.

8. *See H.R. No. 92-1441, 1972 U.S. Code Congressional & Administrative News* at 4707.

[1] Two of the Act's new sections are pertinent to the present appeals.⁹ The first of these defines the status which the affected employee must occupy to bring his injury within the Act's coverage:

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . 33 U.S.C. § 902(3).

The other provision describes the situs where a covered injury must occur:

Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading unloading, repairing, or building a vessel). *Id.* § 903(a).

From these statutes, the general thrust of the new Act's coverage is clear. Congress has replaced the old "water's

9. None of the employers denies that it is an "employer" within the meaning of new Section 902(4):

The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). In any event, it is clear that this section requires merely that an employer have at least one employee engaged in "maritime employment" (the requirement of new Section 902(3)'s definition of an "employee") on the situs defined in new Section 903(a). Thus, if a claimant can satisfy Sections 902(3) and 903(a), his employer is automatically brought within Section 902(4).

edge" analysis with a two-part test which requires (1) that the claimant have been engaged in "maritime employment" and (2) that the injury have taken place upon the situs specified in the Act.

[2, 3] The Act's definition of "maritime employment" is the focus of most of the legal controversy which rages in the parties' voluminous briefs. Unfortunately, much of this learned debate is of little relevance, if any, to the cases now before this Court. Counsel have drawn our attention to a host of pre-1972 decisions which discussed the meaning of the term "maritime employment" as used in the former Act. *See, e.g., Pennsylvania R.R. v. O'Rourke*, 344 U.S. 334, 73 S.Ct. 302, 97 L.Ed. 367 (1953); *Nalco Chemical Corp. v. Shea*, 419 F.2d 572 (5th Cir. 1969). Under the old Act, as under the present one, an employer was liable if he had one or more employees engaged in "maritime employment".¹⁰ However, judicial constructions of the pre-1972 Act were necessarily limited by the "water's edge" approach of that statute.¹¹ For this reason, these older cases simply do not speak to the issue of what land-based employment is sufficiently "maritime" to be covered by the new Act.¹² Fortunately,

10. Compare old 33 U.S.C. § 902(4) with new 33 U.S.C. § 902(4). As we have indicated, *supra* note 9, the only way to read the new Act consistently is to give the words "maritime employment" in new Section 902(4) the same meaning as in new Section 902(3).

11. Not only, as noted was the "water's edge" doctrine applied to the situs of the claimant's injury, but the "maritime employment" of the employer's workers was required to take place "upon the navigable waters of the United States (including any dry dock)". See old 33 U.S.C. § 902(4).

12. The commendable diligence of counsel has uncovered some scattered dicta which might be read as suggesting the general nature of "maritime" work. *See, e. g., Pennsylvania R. R. v. O'Rourke, supra*

Congress itself has answered that question. The terms of the statute allow coverage for an injured employee who was working as a longshoreman, a ship repairman, a shipbuilder, or a shipbreaker.¹³ The legislative history tells us that an injured employee will be covered if he was "engaged in loading, unloading, repairing, or building a vessel,"¹⁴ but will not be covered merely because he was injured in the area defined by new Section 903(a).¹⁵ In light of these indicia of Congressional intent, we must agree with the Court of Appeals for the Ninth Circuit that the new Act requires such a claimant to have been engaged in the work of loading, etc. *at the time of the injury.* *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957, 960 (9th Cir. 1975). We therefore reject respondents' contention that an employee's general job classification (such as "longshoreman" or "ship repairman") will bring him within the Act's coverage regardless of the nature of the work which he was performing when he was injured.¹⁶ In its

344 U.S. at 339-40, 73 S.Ct. 302. These occasional pronouncements by the courts have, at best, only the most tenuous connection with the 1972 Amendment's extension of coverage to shoreside injuries. In comparison with the statutory language itself and the legislative history, the timeworn dicta which are urged upon us are entitled to little weight. Also, we note that none of the instant appeals involves an injury which occurred over the waters. Therefore, we need not, and do not, decide if the new Act made any changes in the coverage of such injuries.

13. 33 U.S.C. § 902(3).

14. In light of the statutory language, we regard the omission of shipbreaking from this passage as inadvertent.

15. "The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity." H.R. No. 92-1441, 1972 U.S. Code Congressional & Administrative News, at 4708.

16. For the same reason we also cannot accept the notion that the official name of an employee's union or the language of a union's

reports, Congress has also indicated the extent to which coverage should be granted to persons who are not themselves loading, unloading, repairing, building, or breaking a vessel but who are nevertheless performing closely related functions. Thus, the House Report states that a checker would be performing covered work if he was "directly involved in the loading or unloading functions . . .".¹⁷ Our holding is that an injured worker is a covered "employee" if at the time of his injury (a) he was performing the work of loading, unloading, repairing, building, or breaking a vessel, or (b) although he was not actually carrying out these specified functions, he was "directly involved" in such work.¹⁸

[4, 5] We specifically reject a theory which petitioners in the *Pfeiffer* and *Ayers Steamship* cases advance as the proper rule for cargo handling operations. They claim that the Act's coverage depends upon whether cargo has reached its shoreside "point of rest", as that term is used in the maritime industry.¹⁹ To these petitioners, men who

jurisdictional agreement is dispositive of the issue of coverage. It is the employee's work at the time of the injury which controls.

17. *Id.* (Emphasis supplied.) The same report also states that clerical employees who do not "participate in the loading, or unloading of cargo" would not be covered by the new Act. *Id.*

18. See Gorman, *The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments*, 6 Journal of Maritime Law and Commerce 1, 10 (1974). By this holding, we do not mean to suggest that future cases may not bring to light other types of covered work which cannot be characterized as loading, unloading, repairing, building, or breaking, and which are not "directly involved" with these five types of work, but which nevertheless are sufficiently similar to fall within the Congressional scheme. No such additional category of covered work appears in the cases before us, but we will not foreclose the possibility of such categories arising in future litigation.

19. The Federal Maritime Commission has defined the "point of rest" as follows:

are handling cargo on its way to a vessel are not covered by the Act until that cargo reaches its last marshaling area prior to being taken on board a ship. Similarly, under this theory men who are unloading cargo from ships are performing covered work only until they reach the first marshaling area for cargo on shore. We are unable to find any support for such a hypertechnical construction of the 1972 Amendments.²⁰ In our view if Congress had wished to adopt the "point of rest" as the test for coverage, it would have made that intention clear. As it is, the "point of rest" analysis is to be found neither in the statute itself nor in the legislative history. The closest approach to such a test appears in the following passage from the House Report:

To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area . . . [E]mployees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered . . . H.R. No. 92—1441, 1972 U.S. Code Congressional & Administrative News, at 4708.

For the purpose of this section, "point of rest" shall be defined as that area on the terminal facility which is assigned for the receipt of inbound cargo from the ship and from which inbound cargo may be delivered to the consignee, and that area which is assigned for the receipt of outbound cargo from shippers for vessel loading. 46 C.F.R. § 533.6(c) (1975).

20. A narrowly technical construction of the Longshoremen's and Harbor Workers' Compensation Act has traditionally been disfavored. See, e.g., *Luckenback S.S. Co. v. Norton*, 106 F.2d 137, 138 (3d Cir. 1939).

In our opinion, these remarks establish no more than that workers who bring cargo to a storage area from on board ship are covered, while those persons (generally truckers or railroad personnel) who merely receive cargo and transport it inland are not covered. The House Committee in this passage did not even mention those employees who handle cargo between the first holding area and the cargo's departure via land transportation. It is precisely the treatment of this intermediate group of workers with which we are here concerned, and this passage is totally silent as to them. Elsewhere, as we have seen, the Committee indicated that employees who are directly involved in loading or unloading will be covered by the new Act. In the absence of explicit language which would establish a "point of rest" dividing line for shoreside cargo handlers, we will apply this general test to them as well.²¹

21. In deciding how to interpret the Amendments and their legislative history, we have remembered that this Act is to be liberally construed in favor of injured employees. See *Voris v. Eikel*, 346 U.S. 328, 333, 74 S.Ct. 88, 98 L.Ed. 5 (1953). In our view, this principle requires us to resolve doubts as to the new Act's coverage in favor of a particular group of workers such as cargo handlers landward of the "point of rest".

Brief mention should also be made of the House Committee's announced intention "to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity", H.R. No. 92-1441, *supra*, at 4708. We agree that here the Committee was speaking of one inequity of the old "water's edge" approach, under which cargo handlers would walk in and out of coverage as they moved between ship and shore. However, we see no reason to treat this statement as a comprehensive description of the new Act's coverage, with the result that only those workers who spend part of their days upon the waters would be covered. In this passage, the Committee was merely addressing itself to one anomaly which it wished to eliminate. The same paragraph clearly states that checkers would be covered by the new Act, and the Committee gave no indication that coverage would depend on whether the checkers went on board ship. The test, rather, was to be whether they were "directly involved in the loading or unloading functions". *Id.*

[6] Our interpretation of the new situs provision follows the same general lines as our construction of Section 902(3). Just as we choose to ignore the labels which an employer or a union has bestowed upon an employee, and instead rely upon the employee's work function at the time of the injury, likewise we will look past an area's formal nomenclature and examine the facts to see if the situs is one "customarily used by an employer in loading, unloading, repairing or building a vessel." The clear statutory scheme is to cover employees who are injured while performing certain types of work in an area which is customarily used for such work. Whether or not an employer or local custom has decided to designate an area as a "terminal", for example, is not dispositive of the situs issue. We will require that a putative situs actually be used for loading, unloading, or one of the other functions specified in the Act. As with the "maritime employment" test, we also interpret the Act as requiring that the situs meet the statutory requirements as of the time of the injury. It will not suffice if the area was so used only in the past, or if such uses are merely contemplated for the future.

III

THE COVERAGE ISSUE IN THESE APPEALS

[7-9] With the general tests for the amended Act's coverage in mind, we now turn to the specific facts of each of the present cases. In deciding each appeal, we must remember that the Act is to be liberally construed in favor of injured workers, *see Voris v. Eikel*, 346 U.S. 328, 333, 74 S.Ct. 88, 98 L.Ed. 5 (1953). We are also bound by a statutory presumption that an individual claim

comes within the Act's coverage. 33 U.S.C. § 290(a). Finally, we will not set aside an award made by the Benefits Review Board so long as it is supported by substantial evidence on the record considered as a whole, and so long as there is a reasonable legal basis for the Board's conclusion. *See O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508, 71 S.Ct. 470, 95 L.Ed. 403 (1951); *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 478-79, 67 S.Ct. 801, 91 L.Ed. 1028 (1947).²²

[10] A. No. 75-1659. Herbert Perdue was employed by Jacksonville Shipyards, Inc., as a shipfitter. On February 2, 1973, he performed repair work for a twelve-hour shift (7:00 a.m. to 7:00 p.m.) aboard an aircraft carrier which was berthed at the Mayport Naval Station in Jacksonville, Florida. At the end of the working day, Perdue took a bus to an office which his employer maintained approximately one mile from the carrier. The bus was provided by Perdue's employer, and the office was the place where Perdue had to "punch out" on a time clock before and after each shift. While alighting from the bus near the office, Perdue stumbled and injured his left knee in a fall upon the pavement. In our view, the Board should have sustained the Administrative Law Judge's determination that Perdue was not injured on a situs defined by new Section 903(a). There is literally nothing in the record to support a conclusion that the employer's office was on the navigable waters or in an "adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." The vessel

22. Although these cases were decided under the old Act, which provided for administrative adjudication by a deputy commissioner and for judicial review by a United States District Court, petitioners have offered no reason why the standard of review should be different under the present Act.

upon which Perdue was working was a mile away, and the "punch out" office was a purely clerical and administrative post separated from the waters by other facilities which likewise were not used for loading, unloading, ship repair, or shipbuilding.²³ Under no reasonable construction of the Act did this area either "adjoin" the waters or carry out any of the functions specified in Section 903(a). We reject the argument that the new Act covers every point in a large marine facility where a ship repairman might go at his employer's direction. In the words of the Administrative Law Judge below, the locus of this injury had "nothing to do with loading, unloading, building or repairing vessels" (Appendix at 19). Therefore we must reverse the Board's determination that Perdue is entitled to compensation under the new Act.

[11] B. No. 75-2833. Charles W. Skipper was another employee of Jacksonville Shipyards, Inc. For many years, he had been primarily engaged in ship repair work as a welder and burner. On the morning of February 8, 1974, Skipper reported for work as usual. However, instead of being assigned to his normal duties as a ship repairman, he was sent across the St. John's River to a disused marine facility called the Southside Yard. There, he was to assist in tearing down a building which had formerly housed a fabrication shop. The purpose of dismantling this structure was to salvage some steel for use in constructing a plant which would manufacture sandblasting equipment. The activities of Jacksonville Shipyards, Inc. are quite diversified, and the contemplated plant was a new business venture. Skipper himself had previously from time to time been assigned work, such as this salvage operation, which

23. The parties have stipulated that the nearest body of water was 500 yards away from the office.

did not involve ship repair. On the day in question, Skipper was injured when some beams fell from the structure during the dismantling process and several steel fragments struck his forehead. At the time of the injury, all of the shops in the Southside Yard were closed, and no repair or fabrication work was being carried out there. Occasionally, ships would still be tied up at the pier in the Southside Yard, and repairmen or other workers would be sent from the employer's active facilities to work on these ships. However, such work would have no relationship to the various disused facilities in the Southside Yard, including the former fabrication shop in question, which was located between one hundred fifty and two hundred feet from the water. On these facts, we perceive no basis for the conclusion below that Skipper's injury is compensable under the new Act. Under no reasonable view was Skipper performing ship repair work at the time of his injury, nor was he carrying out any other of the types of work which the statute specifies as "maritime employment". We further hold that this salvage gang was not engaged in any work sufficiently similar to the statutory categories to be seen as a type of shoreside employment which was fairly within Congress' intent despite not being named in the 1972 Amendments. As we have already indicated, we refuse to attach controlling weight to an employee's regular job classification. Therefore, we will not consider Skipper a "ship repairman" under Section 902(3) merely because he normally performed ship repair work. We look only to his duties at the time of the injury, and these were decidedly not within the contemplation of the statute.

[12] It is equally clear that Skipper was not injured on a situs as defined in new Section 903(a). We have

held that under Section 903(a) a covered situs must be "customarily used by an employer in loading, unloading, repairing, or building a vessel" *as of the time of the injury*. In this case, the Southside Yard shops had been inactive for approximately a year when Skipper was injured. No repair work or any other work specified by the statute was being performed in these buildings. Therefore, we must conclude that the former shops had lost their status as ship repair or shipbuilding facilities, and that Skipper was not injured on a Section 903(a) situs.

Because we reverse the administrative finding of coverage under the Act, we need not reach the other issues discussed by the parties, such as the propriety of the award which Skipper received for a facial scar and the various requests which the claimant's lawyers have made for attorney's fees.

[13] C. No. 75-2289. In this case, the parties agree that the situs of the injury was within the contemplation of new Section 903(a), and the only dispute is whether the claimant was performing covered work. On April 12, 1973, Diverson Ford was injured at the port of Beaumont, Texas, while helping to secure a military vehicle to a railway flat car in preparation for its transportation inland. The vehicle in question had arrived either two or seventeen days prior to the date of the accident. Since then, it had remained in the immediate waterfront area. On the day before the injury, a gantry crane at the water's edge had lifted the vehicles onto the flat cars. Ford's work of fastening the vehicles to the flat cars was therefore the last step in transferring this cargo from sea to land transportation. On the other hand, the vehicles were not moved directly from the ship to the flat cars but instead were taken first to a storage area. There is no dispute, then,

that the "point of rest" for these vehicles had intervened since their arrival in port. However, we have today chosen not to adopt the "point of rest" theory of coverage for shoreside cargo handlers. In addition to the general reasons which we have already given for our conclusion, we cannot overlook the injustices which the proposed test would create in a case like this one. Petitioners apparently concede that Ford would be covered if his work were part of a continuous operation which began with the cargo's departure from a ship's hold. As respondents correctly point out, we are being asked to deny coverage purely because of a discontinuity in time created by the cargo's having been stored for a while along the shore. In contrast, under the test which we have adopted a shoreside worker like Ford would be covered if he was directly involved in "longshoring operations" such as unloading a ship. The work which Ford was performing was evidently an integral part of the process of moving maritime cargo from a ship to land transportation. Accordingly, we perceive an ample basis for the Board's determination that Ford was performing covered work, and we therefore affirm that decision.²⁴

[14] D. No. 75-2317. On July 30, 1973, John L. Nulty was employed as a carpenter at a shipyard in Moss Point, Mississippi. At the time of his injury, Nulty was building a piece of woodwork which was to be installed in a new ship that had been launched but not yet commissioned. The ship was berthed about 300 feet from the

24. Petitioners' briefs are rich in references to the title of Ford's union (which was the "warehousemen's" rather than the "longshoremen's" union) and to the jurisdictional agreement between the two unions. As we have already indicated, we do not regard such matters as dispositive; instead, we look to the duties which a claimant was performing at the time of his injury.

fabrication shop where Nulty was working. The part which Nulty was fabricating was designed to hold a spare wheel on board the new ship. Most of Nulty's work was performed in the shop, although at times he would go on board a vessel to take measurements, or to install or repair some woodwork. The parties agree that a fellow employer known as a "shipfitter" would have picked up and installed the item which Nulty was building when he was injured. Under these facts, the Administrative Law Judge and the Benefits Review Board found that Nulty was working as a "shipbuilder" at the time of his injury and thus satisfied Section 902(3)'s definition of covered work. In our view, the only reasonable conclusion is that Nulty was directly involved in an ongoing shipbuilding operation. Under the test which we have adopted, then, Nulty is entitled to compensation under the new Act. We accordingly affirm the Board's finding of coverage.

[15] E. No. 75-4112. On May 2, 1973, Will Bryant was injured while working as a "cotton header" in a warehouse immediately adjacent to a pier in Galveston, Texas. At the port of Galveston, loads of cotton are first deposited at various shoreside warehouses by the inland shippers. The cotton is then placed upon dray wagons and taken to pier warehouses such as the one where Bryant was injured. The work performed by Bryant and other "cotton headers" is to unload the bales of cotton and stack them in pier warehouses. Two local unions, known to many as "cotton header's" and "longshoremen's" locals, have strictly divided waterfront operations between them. Generally, the cotton remains in these warehouses until other employees from the "longshoremen's" union take it on board ship. This storage period may last from less than one day to several weeks, although the average

interval is about one week. At times, the cotton will be moved from one pier warehouse to another before being taken to a ship. In such cases, dray wagons are again used to carry the cotton, and "cotton headers" unload these wagons at the receiving warehouse. Occasionally, the cotton is moved directly from a dray wagon to a ship, in which event the work is performed solely by "longshoremen". The cotton which Bryant was handling at the time of his injury remained in the same warehouse for five days before "longshoremen" arrived to take the cargo aboard a vessel. On these facts, we affirm the Board's conclusion that the injury sustained by Bryant is within the Act's coverage. The situs was a pier-side warehouse in which cotton is stored temporarily before being taken on board ships. Usually, the cargo is taken directly from the warehouse to a ship. It is clear that Bryant was working on a waterfront area "customarily used by an employer in loading . . . a vessel", and that therefore the requirements of Section 903(a) are met. We also will not set aside the Board's determination that Bryant was performing the work of an "employee" as defined in Section 902(3). We have already noted the established principle of liberal construction of this Act, and the statutory presumption that a claim is within the Act's coverage. Also, we are bound to respect the Board's conclusions if they are supported by the record and if they have a reasonable legal basis. In view of the limited nature of our review, we cannot say that the Board erred in defining Bryant's work status. As we here reiterate, we reject the notion that a "point of rest" such as the pier-side warehouse in this case marks the division between covered and uncovered work. We have no doubt that Bryant would be directly involved in "longshoring operations" if, instead

of setting the cargo down, he had handed it to a "long-shoreman" for immediate loading on board a ship. The brief discontinuity in time created by the cotton's temporary storage did not alter the essential nature of Bryant's work, which was an integral part of the ongoing process of moving cargo between land transportation and a ship. Clearly, there is adequate support for a conclusion that Bryant was directly involved in "longshoring operations" and therefore falls within the terms of Section 902(3). Thus, we affirm the Board's decision that the injury in this case is covered by the new Act.²⁵

IV

A CONSTITUTIONAL QUESTION

[16, 17] It is earnestly argued by Halter Marine Fabricators, Inc., and its insurance carrier that the new Act is unconstitutional insofar as it extends coverage to shipbuilding employees who are injured on land. We are reminded that traditionally a contract to build a ship has not been considered to be within the admiralty jurisdiction,²⁶ and that admiralty has traditionally included only those torts which occur upon the waters.²⁷ In the *Halter Marine* case, the employee was injured while working on land in furtherance of a shipbuilding operation. Therefore, we are told, Congress has exceeded the fixed boundaries

25. Once again, we refuse to base our decision upon the designations of the two waterfront unions as "cotton header's" and "long-shoremen's" or upon the terms of their jurisdictional agreements. Compare note 24, *supra*.

26. See, e.g., *Thames Towboat Co. v. The Francis McDonald*, 254 U.S. 242, 243, 41 S.Ct. 65, 65 L.Ed. 245 (1920).

27. See, e.g., *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972).

of admiralty jurisdiction by covering work under a non-maritime contract which is performed on a situs outside the scope of traditional tort jurisdiction. In essence, the argument is that the sum of traditional admiralty tort and contract jurisdiction defines the absolute limits within which Congress may legislate under the Admiralty Clause.²⁸ We disagree with this proposition. No authority supports the notion that, in enacting a uniform compensation scheme for waterfront employees, Congress must find a "contract" or "tort" peg upon which to hang its legislation. The true analysis to be applied to such statutes is quite different. It must begin with the longstanding judicial recognition of Congress' broad powers to expand the reach of admiralty jurisdiction. Contrary to the impression created by petitioners' briefs, such judicially authorized expansion has often been geographical in nature. See, e.g., *The Genesee Chief*, 12 How. 443, 13 L.Ed. 1058 (1851), overruling *The Thomas Jefferson*, 10 Wheat. 428, 6 L.Ed. 358 (1825) (abandoning former limitation of admiralty jurisdiction to the tidewaters). The cases which approve the many changes which Congress has made in admiralty jurisdiction are replete with statements such as the following:

The authority of the Congress to enact legislation of this nature [the Ship Mortgage Act, 46 U.S.C. §§ 911, *et seq.*] was not limited by previous decisions as to the extent of the admiralty jurisdiction. We have had abundant reason to realize that our

28. Art. III, Section 2 of the Constitution extends the federal judicial power "to all Cases of admiralty and maritime jurisdiction . . ." This clause has always been construed as empowering Congress to legislate in maritime matters. See, e.g., *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 361, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959).

experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned . . . *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 52, 55 S.Ct. 31, 41, 79 L.Ed. 176 (1934).

The Supreme Court has also consistently followed the view that this Congressional power "permits of the exercise of a wide discretion". *Panama R.R. v. Johnson*, 264 U.S. 375, 386, 44 S.Ct. 391, 394, 68 L.Ed. 748 (1924). Our conclusion is that, in the exercise of its discretion, Congress could properly determine that "new conceptions of maritime concerns" justified the extension of compensation coverage to workers in the immediate waterfront area who participate in an ongoing shipbuilding operation. As the legislative history makes clear, Congress was concerned that under the former Act maritime workers were covered over the waters but not covered while performing similar or related work on shore. The inequities of the pre-1972 Act in this regard are obvious, and we feel that this concern was a legitimate reason for Congress to exercise its discretion. We also feel that this concern was a "maritime" one within the meaning of the Admiralty Clause. We have already indicated that, in defining "maritime" concerns, we will not be limited by the rules which apply to tort and contract litigation. In the present case, we are not considering whether Congress would authorize suits upon shipbuilding contracts or whether land-based torts could be made actionable by an admiralty statute.²⁹ We deal only with the case before us, and in our view Congress could reasonably have felt that shipbuilding employees beside the navigable waters were performing a sufficiently maritime function to be covered

29. See 1A *Benedict on Admiralty* § 94, at 5-15 (6th ed. 1973).

by a revamped harbor workers' compensation statute. We therefore cannot conclude that Congress exceeded its broad discretion by extending coverage to such work.³⁰

V

DIRECTOR A PROPER RESPONDENT

[18] This issue is before the Court in rather an odd fashion. In their main brief on appeal, the *Ayers Steamship* petitioners allege that the Director of the Office of Workers' Compensation Programs, United States Department of Labor, is not a proper respondent in this Court, although he could appear as *amicus curiae*. We decline to consider the merits of this contention. First, we note that petitioners have never moved to dismiss the Director as a respondent. In our view, the relief which petitioners seek—dismissal of the Director as a party and addition of him as *amicus Curiae*—is properly requested by a motion pursuant to Rule 27 of the Federal Rules of Appellate Procedure. Under that Rule, a motion is the appropriate vehicle for making "an application for an order or other relief", a category which clearly includes the request which petitioners have made for the first time in their brief. Furthermore, even assuming that petitioners have adequately raised this point, we cannot overlook the fact that in the two *Jacksonville Shipyards* cases another panel of this Court has granted motions by the Director to be added as a party respondent. These legal determinations that the Director may properly appear as a respondent must be respected by this Court. As a general rule, one panel can-

30. Because of our disposition of this issue, we need not reach the questions of whether the 1972 Amendments were an exercise of Congress' power under the Commerce Clause as well as under the Admiralty Clause.

not overrule the precedents set by another panel, absent some intervening factor such as a new controlling decision of the Supreme Court. *See Davis v. Estelle*, 529 F.2d 437, 441 (5th Cir. 1976). No such factor is present in this case, and we will therefore allow the Director to remain before this Court as a respondent.

VI

DUE PROCESS

[19, 20] In the *Pfeiffer* case, the Benefits Review Board awarded an attorney's fee to counsel for the successful claimant. The fee covered only the work which was performed before the Board, and the manner of its award was as follows. Pursuant to the applicable regulation,³¹ counsel presented his request for an attorney's fee, supported by a complete statement of the services which had been performed. Finding a fee of \$1,000 to be "fair and reasonable for the work done in connection with these appeals", the Board approved an award in that amount, remanding the case to the Administrative Law Judge for determination of a fee for counsel's services at that level. Petitioners opposed the award, arguing that counsel had not "properly proved" the reasonableness of the fee and that petitioners should have an opportunity to offer evidence and to cross-examine counsel on the amount of his fee. The evidentiary hearing which they requested was alleged to be a requirement of the Fifth Amendment's Due Process Clause. The board rejected these arguments, and so do we. Government officials are, of course, required to minimize the risks of error and unfairness in

31. 20 C.F.R. § 702.132 (1975). The statutory basis for this regulation is 33 U.S.C. §§ 928(a) & (c), as amended.

the procedures by which one is deprived of life, liberty, or property. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 581, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 609-10, 618, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974). We feel that these risks were adequately minimized by the procedures which the Board followed. The Board was clearly able to evaluate the services which counsel performed before it. It was the Board which read counsel's briefs and observed his representation of the claimant in the administrative appeal. Thus, the fee which the Board granted was carefully limited to those services of which it had first-hand knowledge. Especially in view of the extremely generalized nature of petitioners' attack upon the fee's reasonableness, we cannot say that disposing of petitioners' objections without an evidentiary hearing was a violation of the Due Process Clause.

VII

CONCLUSION

For the foregoing reasons, the decisions of the Benefits Review Board in Nos. 75-1659 and 75-2833 are REVERSED. The Board's decisions in Nos. 75-2289, 75-2317 and 75-4112 are AFFIRMED in all respects.

APPENDIX D

CARGILL, INC., and State Accident Insurance Fund,
Petitioner,

v.

KENNETH E. POWELL, and Director, Office
of Worker's Compensation Programs,
Respondent.

NO. 75-2655.

UNITED STATES COURT OF APPEALS,
Ninth Circuit.

Nov. 17, 1977.

Rehearing and Rehearing En Banc

Feb. 7, 1978.

573 F.2d 561

On petition for review of the Benefits Review Board, which decided that injury suffered by claimant in course of his employment was within coverage of the Longshoremen's and Harbor Workers' Compensation Act, the Court of Appeals, Eugene A. Wright, Circuit Judge, held that claimant, whose injury was sustained in terminal area that at least in part was used in loading and unloading ships but who was employed by grain merchant to unload railroad cars transporting grain from inland points and who had not once during seven months he had performed such duties been called on to assist directly in

loading and unloading of any ship, was not covered by the Act.

Petition granted and case remanded.

J. Blaine Anderson, J., filed dissenting opinion.

On Petition for Review of the Benefits Review Board.

Before LUMBARD*, WRIGHT and ANDERSON,
Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge:

This petition for review is brought by Cargill, Inc., and its workers' compensation insurer, the State Accident Insurance Fund, pursuant to 33 U.S.C. § 921(c) of the Longshoremen's and Harbor Workers' Compensation Act [LHWCA], 33 U.S.C. § 901, *et seq.*, seeking reversal of a decision of the Benefits Review Board. The Board's decision held that an injury suffered by Kenneth E. Powell in the course of his employment with Cargill was within the coverage of the LHWCA and thereby reversed the decision of the administrative law judge who had denied Powell's claim.¹

In early 1973 Powell was hired from the union hall, jointly operated by Local 8 of the International Longshoremen's and Warehousemen's Union and the employers in the Port of Portland, to work for Cargill at its grain handling facilities at Terminal 4, a public dock facility owned by the Port and situated on the Willamette River.

* The Honorable J. Edward Lumbard, Senior United States Circuit Judge, Second Circuit, sitting by designation.

1. The Board's decision is reported at 1 BRBS 503.

The longshoremen employed by Cargill were hired as "key men" which meant that they could perform any of the several tasks involved in the operation and maintenance of all grain handling equipment at the facility. Their work did not include work aboard the ships.

The employer, Cargill, Inc., is in the business of buying and selling grain, most of which is exported overseas. The grain purchased by Cargill is received at Terminal 4 by rail, truck and barge. Once received, the grain is unloaded and delivered by conveyor belts to Cargill's main elevator for weighing and then to bins where it is stored. When a ship is ready for loading the grain is conveyed again to the scales, and then to the ship. The actual distribution of grain into the ship's hold is done by independent stevedoring companies. If a ship was being loaded as grain was being received, the grain would be conveyed directly through the scales to the ship.

On the day of his injury, July 22, 1973, Powell had been continuously employed by Cargill for about seven months. During most of those seven months, and on the day of his injury, he worked as a "tipper" switchman. The "tipper" is a device used to assist in the unloading of railroad cars. The "tipper" would not accept certain railroad gondola cars and when such cars arrived, Powell would assist in the unloading of them. He injured his back while attempting to open one of the cars.

The sole issue before this court is whether Powell's claim is within the coverage of the LHWCA, as amended in 1972.

Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977), goes a long way to defining to whom the LHWCA applies, but there

remains a gray area where maritime activity blends into the nonmaritime. This case lies in that murky area.

In *Northeast Marine Terminal*, the Supreme Court was confronted with the question of coverage under the LHWCA of injuries sustained by two workmen, Carmelo Blundo and Ralph Caputo. On the day of his injury, Blundo was assigned as a "checker" whose responsibility was to check and record cargo as it was loaded onto or unloaded from vessels, barges, or containers. A container is a large metal box capable of carrying large amounts of cargo destined for one or more consignees. When a container carried goods for several different consignees, it would have to be unloaded or "stripped" and the goods would be sorted. Blundo, while recording cargo stripped from a container, was injured when he slipped on some ice on the pier. On the day of his injury Caputo was helping consignee's truckmen load their trucks with cargo. Caputo sustained his injury while rolling a dolly full of cargo into the consignee's truck.

The Supreme Court began its analysis with an extensive review of the legislative history of the LHWCA in general and of the 1972 amendments in particular. According to the Court, Congress, in amending the Act in 1972, had two concerns in mind: (1) "to adapt the LHWCA to modern cargo handling techniques, . . . specifically . . . the impact of containerization," and (2) "to provide continuous coverage through out their employment to these amphibious workers who, without the amendments, would be covered for only part of their activity." At 273, 97 S.Ct. at 2362.

The Supreme Court found that Congress, by broadening the definition of the geographical boundaries of cover-

age and by amending the definition of the class of persons covered, "changed what had been essentially only a 'situs' test of eligibility for compensation to one looking to both the 'situs' of the injury and the 'status' of the injured." At 264-265, 97 S.Ct. at 2358. Applying this situs-status" test, the Court found that Blundo's and Caputo's injuries were sustained within the broadened geographical area of coverage and that their job assignments were within the modernized category of "longshoring operations."

Our task here is to determine the proper application of the "situs-status" test to the facts of this case, bearing in mind the dominant themes of the 1972 amendments. This undertaking is not a simple one since Powell's job, unlike the two jobs involved in *Northeast Marine Terminal*, does not neatly fit either of the two criteria that the Court recognized.

Turning first to the "situs" requirement, we believe there can be little doubt that Powell's injury was within the geographic boundaries of the employer's marine terminal. Powell's injury, like Caputo's, was sustained in the terminal area, which, at least in part, was used in loading and unloading ships. That is sufficient to satisfy the "situs" requirement, as defined by the Court in *Northeast Marine Terminal*.

[1, 2] We now turn to the more difficult question whether Powell has satisfied the "status" requirement. Powell might well have been occupationally classified as a longshoreman for seventeen years, but here we must look to his employment status at the time of the accident.²

2. Similarly, it is not relevant that Powell is a registered member of the International Longshoremen's and Warehousemen's Union, or

As noted above, Powell was employed by a grain merchant to unload railroad cars transporting grain from inland points. He had worked in this position for about seven months at the time of the accident. After being unloaded, the grain was weighed, and then usually was stored for varying periods of time before being loaded aboard ship.³

The Supreme Court noted that "when Congress said it wanted to cover 'longshoremen' it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations." At 273, 97 S.Ct. at 2362. The Court found that Caputo was such a person by focusing on the fact that he could have been assigned to any one of a number of tasks throughout a *single workday* and that to deny coverage for one task while including coverage for another "would be to revitalize the shifting and fortuitous coverage that Congress intended to eliminate." *Id.*

[3] In the past it might have been customary for Powell to hire himself out to employers on an irregular basis, and some of his work may have been indisputably maritime. At the time of the accident, however, Powell had been employed by the same employer performing the same duties for about seven months. Not once during that tenure was he called on to assist directly in the load-

that he worked in virtually all phases of the longshoring operation for every employer in the Port of Portland. We cannot concern ourselves with the entire span of a claimant's career.

3. It is also not relevant that a ship may have been in the process of being loaded by the stevedores at the time of the accident. Whether or not a ship was being loaded could have had no effect on the nature of Powell's duties. His responsibilities only involved unloading the grain from the rail cars to be conveyed to the scales. Whether the grain then went to storage bins, to ships, or to carriers for inland shipment was not a concern of Powell's. Indeed, this point serves to reinforce the view that Powell's duties involved only nonmaritime work.

ing or unloading of any ship, nor is there any evidence that such genuine maritime work was even contemplated. Powell's attention was directed to the unloading of rail cars as they arrived at the elevator. He had no involvement whatsoever with the loading and unloading of the ships themselves. His work was more oriented to the rails than to the sea.

The policy pointed to by the Supreme Court in *Northeast Marine Terminal* to explain Congress's extension of the Act to employees who spend a part of their workday in nonmaritime activity cannot support coverage for Powell. Having served seven months of continuous, non-maritime employment, with no indication that termination of that employment was contemplated, Powell cannot now claim that he is subject to the "shifting and fortuitous coverage" in a single workday that concerned the Supreme Court in *Northeast Marine Terminal*.⁴

We grant the petition for review, and remand for reinstatement of the decision of the administrative law judge denying benefits to the employee.

J. BLAINE ANDERSON, dissenting:

In finding that Powell was not covered by the Act, the majority focuses upon his employment status at the time of the accident and concludes that his activities were "more oriented to the rails than to the sea." Believing

4. This is not to say that an employee whose duties shifted from the maritime to the nonmaritime over a period of time greater than a single workday is never covered by LHWCA. We only note that in *Northeast Marine Terminal*, *supra*, the Supreme Court focused on an employee whose duties shifted throughout a single working day. We do not decide whether an employee whose duties shifted every week, or every month, may still qualify under the Act. That determination must be left to development in future cases.

that Powell's status at the time of the accident was identical to Caputo's in the overall process of loading and unloading, although performed at different ends of the spectrum, I respectfully dissent.

It should be noted that in *Northeast Marine Terminal*, *supra*, the Supreme Court, by focusing on the fact that Caputo could have been assigned to any one of a number of "longshoring" tasks on the day of his injury, did not have to decide the issue before this panel, i.e., whether Caputo's specific unloading task was covered under the Act. However, in my opinion, the Court indicated that that part of Caputo's job would be covered, even if the other tasks performed were not indisputably longshoring operations.

First of all, the Court rejected the point of rest theory as too restrictive. From this it is clear that coverage, in the case of loading, is extended beyond the point where the stevedoring operation begins and the terminal operation ends. The Court also reiterated the only example of work, found in the legislative history that Congress intended to exclude—employees "whose responsibility is only to pick up stored cargo for further transhipment." At 275, n. 37, 97 S.Ct. at 2363. The Court found that this example did not refer to Caputo, but is limited to "workers such as the consignee's truck drivers Caputo was helping, whose presence at the pier or terminal is for the purpose of picking up cargo for further shipment by land transportation." At 274-275, n. 37, 97 S.Ct. at 2363. By analogy to Caputo's job, this example does not pertain to Powell. The purpose of Powell's presence at the terminal was not that of delivering cargo for further shipment by sea, but rather

to initiate the process whereby this delivered cargo was loaded onto a ship.¹ Powell's function was identical to Caputo's in the overall process of loading and unloading, with the only difference being that their jobs were performed at different ends of the spectrum.

I am also persuaded by the fact that the Supreme Court repeatedly noted that the Act should be liberally construed, both because the language "engaged in maritime employment" is broad, and because the Act is remedial legislation. The Court noted that this broad language "suggests that we should take an expansive view of the extended coverage" since "such a construction is appropriate for this remedial legislation." At ___, 97 S.Ct. at 2359. I believe that a liberal construction supports the Board's finding "that the claim-

1. The majority also finds that it is irrelevant that a ship may have been in the process of being loaded at the time of the accident. There was circumstantial evidence that at the time of Powell's injury, a ship was present and being loaded. Mr. Powell testified as follows:

"Q. Mr. Powell, do you know whether or not there was a vessel there at the time of your injury?
 A. Well, I thought there was one there. I'm not sure. I'm not going to—I mean—.
 Q. It doesn't make any difference to you?
 A. As I say, at the time I thought there was a ship there because, if it wasn't there—I mean, the older guys would have been down there working the tipper and stuff like that, and like I say, I was towards the tail end of the layoff deal." (R.T. 34).

I also note that this evidence stands unrebutted by Cargill, even though it was within its power by its own records to demonstrate the reliability or unreliability of Powell's assertion. Accepting Powell's unrebutted version, though somewhat equivocal, I would conclude that some of his activities, like Caputo's in *Northeast Marine Terminal, infra*, were indisputably "longshoring operations," i.e., loading a ship even though his activity was confined to land. It was the beginning point of loading in the same sense that Caputo's activities were the ending point of unloading. To put it another way, could this ship have been loaded if no one had performed Powell's function?

ant's duties of unloading grain . . . was the beginning step of a longshoring operation in maritime employment." I believe that to hold otherwise would be to return to the "hop-scotch" effect that the 1972 amendments were designed to eliminate.

The Petition for Review should be denied.

APPENDIX E

Lawrence J. CONTI, Appellee,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
Appellant.

Simon S. SCARANO, Appellee,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
Appellant.

George M. FUNK, Appellee,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
Appellant.

Nos. 76-2336 to 76-2338.

UNITED STATES COURT OF APPEALS,
Fourth Circuit.

Argued Oct. 3, 1977.

Decided Dec. 8, 1977.

566 F.2d 890.

In action to recover damages under the Federal Employers' Liability Act, an appeal was taken by railroad-employer from a judgment entered in favor of plaintiff by the United States District Court for the Eastern District of Virginia, at Norfolk, Richard B. Kellam, Chief Judge. The Court of Appeals, Field, Senior Circuit Judge, held that where the occupations of plaintiff rail-

road employees were not of a traditionally maritime nature but on the contrary were those traditionally associated with railroading, where their tasks and responsibilities with respect to unloading coal from hopper cars would have been the same at an inland terminal as they were at Lamberts Point on the Elizabeth River in Norfolk, Virginia, and where the sophisticated automation of the facilities at the latter terminal could not obscure the basic fact that, at the time of their injuries, plaintiffs were engaged in unloading a coal train, not loading a vessel, there was nothing in the amendments or legislative history of the Longshoremen's and Harbor Workers' Compensation Act to indicate that Congress, under the circumstances, intended to transfer the redress of such injured railroad workers from the Federal Employers' Liability Act to the Longshoremen's Act; that is, plaintiffs were not maritime employees under the Longshoremen's Act.

Affirmed.

Before BUTZNER, Circuit Judge, FIELD Senior Circuit Judge, and THOMSEN, Senior District Judge.*

FIELD, Senior Circuit Judge:

In each of these three cases the plaintiff filed an action in the district court to recover damages under the provisions of the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51, *et seq.* The defendant filed a motion to dismiss in each case, asserting that at the time of their respective injuries the plaintiffs were engaged in maritime

* Honorable Roszel C. Thomsen, District of Maryland, sitting by designation.

employment within the meaning of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901, *et seq.*, which provides their exclusive remedy. The district court denied the dismissal motions and the cases proceeded to trial and judgment. The only issue on these appeals is whether the district court properly concluded that the plaintiffs were not maritime employees under the LHWCA.

The facts are not disputed. The defendants, Norfolk and Western Railway Company (N&W), is a railroad carrier with its eastern terminus at Lamberts Point on the Elizabeth River in Norfolk, Virginia. The transportation of coal is the largest single revenue source for the N&W, and the export coal is loaded on vessels at the Lamberts Point Yards and Piers which are operated by the N&W.

The export coal originates in the mines in Kentucky, Virginia, and West Virginia and is placed in hopper cars at the mines. The coal is brought to the eastern seaboard by trains usually consisting of some 275 loaded coal cars. Upon reaching the Norfolk terminal the cars are stored in the Portlock Yard and thereafter are moved to the classification yards at Lamberts Point. Upon orders of the yardmaster, the cars are moved from the classification yards to the Barney Yard by a "hump" crew to await loading aboard vessels at Pier 6. Cuts of loaded cars are placed on the 32 tracks of the Barney Yard all of which lead to Pier 6 and slope downhill in the direction of the pier. It is, of course, necessary that a brakeman in the Barney Yard set the brakes on each car to prevent it from rolling forward.

When a car is scheduled to go to the dumpers a brakeman uncouples it from the line of cars and releases the

brakes. Due to the slope of the tracks the car will ordinarily commence to roll freely. However, if the car fails to roll a brakeman will use a pinch bar or teaser to start it moving. The speed of the moving car toward the scale is controlled by a radar-operated retarder, and if the speed of the car exceeds four miles per hour an automatic braking system will cause it to slow down. The car then passes over scales which automatically record the weight, and it continues to roll toward the thawing chamber which is designed to emit heat sufficient to thaw any snow or ice that may be in the coal so that it will flow easily. The car then rolls to the Barney pit where it comes to a complete stop. At that point a brakeman positions the car automatically and operates the cut levers on the car to separate it from other cars in the pit area. Two cars are then shoved forward on parallel tracks to a position where a mechanical device called a Barney Yard "mule" pushes the cars up an incline to the dumpers. As the cars reach the dumpers they are picked up mechanically, turned upside down, and the coal falls into a hopper or receiving bin. The coal is then transported by an underground conveyor belt to the shiploaders on the pier where it is loaded into the hold of a ship by a telescopic arm on the shiploader.

After the coal has been dumped into the bin, the car is mechanically returned to an upright position and pushed forward down an incline by the car that has next come on to the dumper. The speed of the empty car is checked and its direction reversed by the upgrade of the track called the kickback. When the car reaches a point on the upgrade it comes to a stop and then commences to roll backwards. The car is then automatically

switched to another track and rolls down into the "Empty Car Yard." Yard crews of the N&W take the empty cars out of this yard and ultimately they are assembled into trains for the return trip to the coal fields.

During a normal operation some twenty brakemen are assigned to the Barney Yard, together with one to three car retarder operators, two yard foremen and two yard conductors. Brakemen who are assigned to work in the Barney Yard also work in various other yards in the Norfolk terminal and are governed by the same operating and safety rules as other brakemen, conductors and engineers in the N&W system. None of the brakemen ever have occasion to go to Pier 6 or aboard a ship, nor do they ever operate the dumper or loader. The deck foreman, certain clerical workers and motive power personnel are the only employees of the N&W who work on the pier or go aboard the ships.

CONTI

Conti was employed as a brakeman by the N&W, and on March 8, 1975, was working in the Barney Yard at a point where loaded cars were being brought into the yard by the "hump" crews. Conti was responsible for tying brakes, uncoupling levers, giving signals, inspecting cars, and starting cars on their way to the scales and dumpers. He had moved several loaded coal cars a short distance with a pinch bar and had then uncoupled the lead car and was using the pinch bar to start it forward. At that time the "hump" crew knocked a string of cars into the car which Conti was pinching, causing the bar to fly out and injure his leg.

SCARANO

Scarano was employed as a conductor-brakeman by the N&W and on January 22, 1975, was working in the Barney Yard, where he was engaged in pinching loaded coal cars toward the dumper. For some reason, a car at the dumper was not unloaded and Scarano was instructed to ride the loaded car from the dumper to the kickback and then back to the empty yard. Scarano rode the car to the empty yard where he braked it to a halt some 1,000 yards from Pier 6. He then left the car and was walking toward the brakemen's shack when he fell in an unlighted ditch and injured himself.

FUNK

Funk was employed by the N&W as a Barney Yard brakeman, and on April 23, 1975, was working at the south kickback which was outboard or seaward of the Pier 6 south dumper. It was his assignment at that time to make certain that the knuckles on the cars were closed after they had been dumped. Two loaded cars were being brought up to the dumper and when they hit the empty cars they became coupled. It was necessary to stop the shiploading operation until the two empty cars were pulled out from the dumper. Funk was attempting to pull the cars by use of a hook and winch, and while trying to hold the hook in place he injured his right hand.

Disposition of these appeals requires that we examine the area and occupational nature of the plaintiffs' activities at the time of their injuries in the light of the amendments of three sections of the LHWCA which were made in 1972. These sections, with the amendatory

language italicized, now provide in pertinent part as follows:

LHWCA, § 2(3), 33 U.S.C. § 902(3):

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

LHWCA, § 2(4), 33 U.S.C. § 902(4):

The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

LHWCA, § 3(a), 33 U.S.C. § 903(a):

Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

We first had occasion to consider these amendments in *I. T. O. Corp. of Baltimore v. Ben. Rev. Bd., etc.*, 4

Cir., 529 F.2d 1080 (1975). In his opinion for the panel majority in that case Judge Winter, after an extensive review of the background and legislative history of the amendments, summarized them as follows:

Sections 2 and 3 of the present Act establish a dual test for coverage. The situs requirement has been retained, with the definition of "navigable waters" expanded to include certain specified land areas. In addition, a new "status" test has been added: the person injured ("employee") must have been engaged in "maritime employment," a concept which is nowhere defined but which includes "longshoring operations." The net effect of the 1972 Amendments was therefore to *broaden* the area in which an injury would be covered, and *narrow* the class of persons eligible according to job function. *Id.* 1083.

In searching for an effective "status" test to determine when an employee is "engaged in maritime employment" the panel majority in *I.T.O.* adopted the so-called "point of rest" theory. The panel's decision was modified to some degree by the court sitting en banc, 542 F.2d 903 (1976), and while certiorari was pending the Supreme Court handed down its decision in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977).¹ Shortly thereafter the Court vacated our judgment in *I.T.O.* and remanded for further consideration in the light of *Northeast*, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977). The Court's decision in *Northeast* is, of course, the benchmark in our consideration of the present appeals.

1. Consolidated with No. 76-454, *International Terminal Co., Inc. v. Blundo, et al.*, also on certiorari to the same court.

Blundo, one of the respondents in *Northeast*, had been employed for several years as a "checker" by a terminal company at its Brooklyn pier. As a checker Blundo was responsible for checking and recording cargo as it was loaded onto or unloaded from vessels, barges or containers. From day to day Blundo was assigned to work either on a ship or on shore. On the day of his injury he was checking cargo which was being removed from a container on the pier.

The other respondent, Caputo, was a member of a regular longshoring "gang" that worked for a stevedoring company. When his gang was not needed, Caputo went to a hiring hall and was hired by the day by other stevedoring companies or terminal operators who had work available. He had at times been hired to work as a member of a stevedore gang on ships at a pier in Brooklyn, and on other occasions had been hired by Northeast for work in its terminal operations at the same location. On the day of his injury Caputo had been hired by Northeast to perform "terminal labor," and was assigned to assist consignees' truckmen load their trucks with cargo which had been discharged from ships at the terminal. While so engaged Caputo was injured.

The Court had little difficulty in concluding that Blundo satisfied the status test. Noting the Congressional intent to adapt the LHWCA to modern cargo handling techniques, the Court stated that Blundo's task of checking items of cargo as they were unloaded from a container was "clearly an integral part of the unloading process as altered by the advent of containerization and was intended to be reached by the Amendments." 432 U.S. 271, 97 S.Ct. 2361.

With respect to Caputo, the Court observed that the Congressional desire to accommodate the Act to modern technology was irrelevant "since he was injured in the old-fashioned process of putting goods already unloaded from a ship or container into a delivery truck." *Id.* The Court recognized, however, that another objective of Congress was to achieve a uniform compensation system which "did not depend on the 'fortuitous circumstance of whether the injury [to the longshoreman] occurred on land or over water,'" *Id.* and, accordingly "extended the situs to encompass the waterfront areas where the overall loading and unloading process occurs." *Id.*

The Director of the Office of Workers' Compensation Programs had urged upon the Court the view that "maritime employment", as used in the Amendments, should include "all physical tasks performed on the waterfront, and particularly, those tasks necessary to transfer cargo between land and water transportation." *Id.*, 432 U.S. at 272, 97 S.Ct. at 2361. The Court, however, found it unnecessary to pass upon the validity of the Director's position, stating:

It is clear, at a minimum, that when someone like Caputo performs such a task, he is to be covered. The Act focuses primarily on occupations—longshoreman, harbor worker, ship repairman, shipbuilder, shipbreaker. Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the amendments, would be covered only for part of their activity. It seems clear, therefore, that when Congress said it wanted to cover "longshoremen," it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring op-

erations and who, without the amendments, would be covered for only part of their activity. *Id.*, 432 U.S. at 273, 97 S.Ct. at 2362.

[1] To us the nub of the Court's decision is that an employee who is not engaged in "an integral part of the unloading process" will not fall within the coverage of the Act unless his occupation is of a traditional maritime nature. This was the construction placed upon the statutory language by the Ninth Circuit in *Weyerhauser Company v. Gilmore*, 528 F.2d 957, 961 (1976), cert. denied 429 U.S. 868, 97 S.Ct. 179, 50 L.Ed.2d 148 (1976):

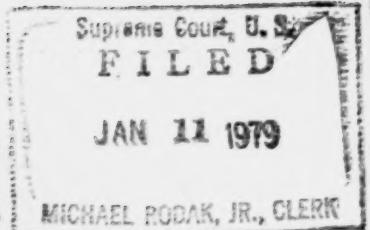
We hold that for an injured employee to be eligible for federal compensation under [the Act], his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to "traditional maritime activity involving navigation and commerce on navigable waters," with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in § 903. (Citations omitted).

[2] It is clear that in the cases before us the occupations of the plaintiffs were not of a traditionally maritime nature, but on the contrary were those traditionally associated with railroading. Their tasks and responsibilities with respect to the unloading of the coal from the hopper cars would have been the same at an inland terminal as they were at Lamberts Point, and the sophisticated automation of the facilities at the latter terminal should not obscure the basic fact that the plaintiffs were engaged in unloading a coal train, not loading a vessel.

We find nothing in the Amendments or the legislative history to indicate that under these circumstances the Congress intended to transfer the redress of such injured railroad workers from the FELA to the Longshoremen's Act.

Since we agree with the district court that the plaintiffs were not engaged in maritime employment at the time of their injuries, the judgments are affirmed.

AFFIRMED.



APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

NO. 78-425

P. C. PFEIFFER CO., INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

Petition For Certiorari Filed September 13, 1978

Certiorari Granted November 27, 1978

I.

INDEX

1. Docket Summaries	
a. P. C. Pfeiffer Co., et al. v. Diverson Ford, et al.	1
b. Ayers Steamship Company, et al. v. Will Bryant, et al.	2
2. Ford - Joint Exhibit No. 1 - AGREED STATEMENT OF FACTS AND STIPULATIONS, including photo- graphs and sketch.	3
3. Ford - Joint Exhibit No. 2.	16
4. Ford - DECISION AND ORDER of Ad- ministrative Law Judge, dated August 29, 1974 (Ford Record, pp. 3-17).	20
5. Ford - DECISION of Benefits Review Board dated March 21, 1975 (Ford Record, pp. 205-210). .	41
6. Bryant - AGREED STATEMENT OF FACTS AND STIPULATIONS (Bryant Record, pp. 38-42.) .	46
7. Bryant - SUPPLEMENTAL AGREED STIPULATIONS OF FACT (Bryant Record, pp. 43-45). .	53
8. Bryant - Additional SUPPLEMENTAL A- GREED STIPULATIONS OF FACT (Bryant Record, pp. 46- 50).	56
9. Bryant - DECISION AND ORDER of Ad- ministrative Law Judge, dated February 28, 1975 (Bryant Re- cord, pp. 11-34).	64

II.

10. Bryant - DECISION of Benefits Review Board dated November 13, 1975 (Bryant Record, pp. 218-224). . .

11. Consolidated Opinion of Court of Appeals for the Fifth Circuit, September 27, 1976, 539 F.2d 533, appears as Appendix C to the PETITION FOR A WRIT OF CERTIORARI in this case (Petition, pp. 30-35).

12. MEMORANDUM ORDER of the Supreme Court of the United States, June 27, 1977, 433 U.S. 904, appears as Appendix B to the PETITION FOR A WRIT OF CERTIORARI in this case (Petition, p. 29).

13. Consolidated Opinion on Remand to the United States Court of Appeals for the Fifth Circuit, June 16, 1978, 575 F.2d 79, appears as Appendix A to the PETITION FOR A WRIT OF CERTIORARI in this case (Petition, pp. 27-28).

93

DOCKET SUMMARY*

P. C. Pfeiffer Co., Inc., et al, v. Diverson Ford:

June 12, 1974 Formal Hearing at Beaumont, Texas, with submission of "AGREED STATEMENT OF FACTS AND STIPULATIONS."

August 29, 1974 DECISION AND ORDER of Administrative Law Judge Vanderheyden.

February 21, 1975 Oral Argument before Benefits Review Board at Houston, Texas.

March 21, 1975 DECISION of Benefits Review Board.

March 17, 1976 ORDER of the United States Court of Appeals for the Fifth Circuit consolidating *Ford* with *Bryant vs. Ayers Steamship Co., et al.*

September 27, 1976 DECISION of Court of Appeals for the Fifth Circuit, 539 F.2d 533.

June 27, 1977 ORDER of the Supreme Court of the United States vacating lower court opinion and remanding for further consideration, 433 U.S. 904.

June 16, 1978 DECISION of Court of Appeals for the Fifth Circuit on Remand, 575 F.2d 79.

September 13, 1978 PETITION FOR A WRIT OF CERTIORARI filed.

November 27, 1978 PETITION FOR A WRIT OF CERTIORARI, granted.

* Prepared by counsel for Petitioner.
Rule 36(1); Memorandum Instructions No. 4.

DOCKET SUMMARY*

Ayers Steamship Company, et al, v. Will Bryant:

October 18, 1973	AGREED STATEMENT OF FACTS AND STIPULATIONS, filed.
December 17, 1973	SUPPLEMENTAL AGREED STIPULATIONS OF FACT, filed.
May 7, 1974	Additional SUPPLEMENTAL AGREED STIPULATIONS OF FACT, submitted.
February 28, 1975	DECISION AND ORDER of Administrative Law Judge Devaney.
November 13, 1975	DECISION of Benefits Review Board.
March 17, 1976	ORDER of the United States Court of Appeals for the Fifth Circuit consolidating <i>Bryant</i> with <i>Ford vs. P. C. Pfeiffer Co., Inc., et al.</i>
September 27, 1976	DECISION of Court of Appeals for the Fifth Circuit, 539 F.2d 533.
June 27, 1977	ORDER of the Supreme Court of the United States vacating lower court opinion and remanding for further consideration, 433 U.S. 904.
June 16, 1978	DECISION of Court of Appeals for the Fifth Circuit on Remand, 575 F.2d 79.
September 13, 1978	PETITION FOR A WRIT OF CERTIORARI, filed.
November 27 1978	PETITION FOR A WRIT OF CERTIORARI, granted.

* Prepared by counsel for Petitioner.
Rule 36(1); Memorandum Instructions No. 4.

DEPARTMENT OF LABOR
OFFICE OF WORKMEN'S COMPENSATION
PROGRAMS
BEAUMONT, TEXAS

74-LHCA-181
FILE NO. 8-188774

DIVERSON FORD, Claimant

v.

P. C. PFEIFFER COMPANY INC., Employer, and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Insurance Carrier

AGREED STATEMENT OF FACTS
AND STIPULATIONS

On April 12, 1973, Mr. Diverson Ford was injured while employed by P. C. Pfeiffer Company, Inc., at Beaumont, Texas. The sole issue for determination at this time is whether this injury occurred within the jurisdiction of the Longshoremen's & Harbor Workers' Compensation Act or within the jurisdiction of the Texas Workmen's Compensation Act. The Claimant, Diverson Ford, the Employer, P. C. Pfeiffer Company, Inc. and its Insurance Carrier, Texas Employers' Insurance Association, stipulate and agree to the following facts for the purpose of permitting this jurisdictional dispute to be submitted to an Administrative Law Judge for decision:

I.

It is hereby stipulated and agreed that the Claimant, Diverson Ford, sustained an accidental injury on April 12, 1973, in the course and scope of his employment for the P. C. Pfeiffer Company, Inc. in the City of Beaumont, Texas, when he struck the tip of his second (middle) finger, left hand, with a hammer; that Texas Employers' Insurance Association had in effect, subject to the resolution of the jurisdictional question in this claim, Workmen's Compensation insurance covering employees of the P. C. Pfeiffer Company, Inc.; that notice of injury was timely given; that claim for compensation was timely filed; that the claim for compensation was timely controverted; and that the employer and its insurance carrier have furnished such medical care and attention as the nature of the injury and the progress of recovery have required. It is further stipulated and agreed that during the year next preceding injury, the Claimant, Diverson Ford, had an average weekly wage of \$57.83, and his compensation rate under the Longshoremen's Act, if applicable, would be \$57.83 per week for total disability and \$38.56 per week for permanent partial disability. That following the injury in question, he sustained a period of temporary total disability from April 12, 1973 to May 7, 1973, a period of four weeks, for which compensation under the Longshoremen's Act would amount to \$231.32.

It is further stipulated and agreed that the insurance carrier has paid to the claimant compensation for temporary total disability for four weeks at the weekly rate of \$34.52 per week in the total sum of \$138.08 under the Workmen's Compensation Act of Texas; that if juris-

diction is found to exist under the Longshoremen's Act, the Employer and Insurance Carrier are entitled to a credit in this amount against the agreed upon figures as the compensation under the Longshoremen's Act; that whatever additional compensation, if any, Claimant may be entitled to under the Texas Act if jurisdiction is found not to exist under the Longshoremen's Act will be determined after any party has exhausted whatever appellate procedures they may take on the jurisdictional issue in this claim.

II.

The injury occurred between the rails of the gantry crane on City Dock No. 2 at the Port of Beaumont, which is an open concrete apron dock approximately 170 feet in width. The gantry crane runs on permanent rails along the edge of the dock, with two railroad tracks running within the span of the gantry and thus under the boom. The rail of the gantry nearest the water is approximately two feet, seven inches from the edge of the dock, with the distance between the rails of the gantry being 32 feet, two inches. This gantry crane is used in the loading and unloading of vessels, but when no vessel loading or unloading operations are in progress, it is also used in the loading and unloading of railroad cars.

On the attached aerial photograph (Exhibit 1) the pertinent areas are indicated as follows:

1. The gantry crane is located at the end of the yellow arrow numbered 1.
2. The No. 2 dock apron is marked at the end of the yellow arrow numbered 2.

3. The vehicle storage areas are marked at the end of the yellow arrow numbered 3.

Additionally, on the attached diagram (Exhibit 2), the pertinent areas are indicated by the same numbers. Exhibit 1 was not taken on the date of the accident and at the time this photograph was taken a vessel was at the berth adjacent to the crane and vehicles were stored on the dock apron itself. Neither of these two noted conditions existed on the morning of Claimant's accident.

III.

Claimant was working as a member of a securing gang out of Warehousemen's Local 1316 and was engaged in fastening military vehicles onto railroad flat cars in the area between the rails of the gantry crane when he accidentally struck the end of his finger with a hammer. On the date of the Claimant's injury, April 12, 1973, no vessel was docked at City Dock No. 2, and the gantry crane was not in use for any purpose. On the previous day, the crane had been employed to load heavy military vehicles out of a nearby storage area onto railroad flat cars for shipment inland. Some of the military vehicles had been towed or driven from a yard storage area (marked as No. 3 on the attached Exhibits) to a spot within the reach of the gantry crane (No. 1 on the attached Exhibits) and then had been lifted onto the railroad cars for ultimate transportation to an inland arsenal. Additionally, Claimant would testify that some, but not all, of the military vehicles loaded aboard the railroad cars came from storage on the dock apron itself. The railroad cars remained overnight under the gantry crane, and Claimant was employed on the following morning as

a member of a warehousemen's gang for the sole purpose of securely fastening the military vehicles to the railroad cars. Claimant would testify that he had been employed in the work of bringing the vehicle back to the crane and placing it on to the rail car on the day prior to his accident, but the payroll records of the employer indicate that claimant was not employed at all on the day prior to his accident. These records indicate that Ford was employed on April 9 and 10, 1973, in a warehouseman capacity shifting bagged cargo, that he was not employed on April 11, 1973, and that he was employed again in a warehouseman capacity on April 12, 1973 to secure the military vehicles onto the railroad cars.

The eight vehicles on which the Claimant's securing gang was working had been delivered to the Port of Beaumont on prior occasions and placed in a vehicle storage yard (marked as # 3 on the Exhibits) near the concrete apron (#2 on the Exhibits) of City Dock No. 2. Some, but not all, of the vehicles may have been stored on the dock apron itself. Seven of the vehicles had been brought to Beaumont by the SS THOMAS JEFFERSON, which sailed from Beaumont on March 26, 1973, and the vehicles had been discharged to the storage yard on March 25 and 26, 1973, seventeen days before Claimant's accident. One of the vehicles had been brought to Beaumont by the SS JAMES which had completed discharging on the morning of April 10th and had sailed from Beaumont on the afternoon of April 10th, 1973, two days before Ford's accident. The exact military vehicle on which the Claimant was working at the moment of his accident has not been identified, but it definitely was one of the eight described above which had come from the

vehicle storage yard or from the dock storage area itself. The vehicle on which Claimant was working had been brought from the storage area and loaded aboard the rail car on the day prior to the accident. On the morning of the accident Claimant was engaged solely in securing the vehicle to the rail car for shipment inland.

IV.

Ford was employed by the Warehouse Division of P. C. Pfeiffer Company, Inc. Pfeiffer is a multi-faceted corporation which in its various capacities performs warehousing services for the Port of Beaumont, contract stevedoring services for various shipping lines and agencies, and shipping agency services for various shipping lines and vessels. Those employees of the shipping agency and contracting stevedoring division of P. C. Pfeiffer Company, Inc. do have occasion to work aboard vessels on the navigable waters of the United States in the course of their employment, but men employed by the Warehouse Division of Pfeiffer and working out of the Warehousemen's local union never go aboard vessels or otherwise work on the navigable waters of the United States. However, claimant has worked in the stevedoring division of P. C. Pfeiffer aboard deepsea vessels as well as for other stevedoring companies within the Port of Beaumont. Pfeiffer's Warehouse Division is located within the offices of the Port of Beaumont Navigation District and thus is physically separated from the stevedoring division of the Company. All warehouse operation orders are received by Pfeiffer from the Port of Beaumont on the basis of an exclusive contract between Pfeiffer and the Port for these warehousing services. When government cargo is involved, whether inbound or outbound from the Port of Beaumont,

the Port of Beaumont is paid for these warehousing services by the Government. When non-military cargo is involved, the Port of Beaumont is paid for these warehousing services by the shipper if the cargo is outbound and by the receiver of the cargo if it is inbound. Pfeiffer's stevedoring operations are conducted directly for shipping agencies or vessels on the basis of bidding for the particular work to be performed. Whenever the peculiar nature or size of the cargo or the exigencies of scheduling require that cargo be loaded directly from a railroad car or truck to a vessel or directly from the vessel to a railroad car or truck, such work is jurisdictionally allocated to the deep sea longshoremen and is necessarily performed by men working out of the deep sea local unions for stevedoring companies. No men working out of the warehousemen's local unions are involved at all in such loading or unloading operations, nor are the warehouse employer's management personnel involved in such operations.

Pfeiffer, the Claimant's employer, had not performed the stevedoring services for either vessel which delivered the military vehicles on which Claimant was working at the time of his accident. Pfeiffer's agency division had performed ship's agent services, but not stevedoring services for the SS THOMAS JEFFERSON, which sailed from Beaumont on March 26, 1973, but Pfeiffer had no connection whatever with the call of the SS JAMES at the Port of Beaumont which ended April 10, 1973. No employees of P. C. Pfeiffer Company had participated in any way in the physical removal of the military vehicles from the oceangoing vessels or their transfer to the vehicle storage yard within the terminal area. The warehouse division of P. C. Pfeiffer Co., Inc. was employed to load

and prepare the vehicles for shipment inland by rail, and Ford was employed solely to fasten the vehicles onto the rail cars.

Ford was working out of Warehousemen's Local 1316. Men working out of the Warehousemen's Local at the warehousemen's rate of pay never go aboard vessels and never approach a vessel's cargo whip. Warehousemen are never involved in the moving of cargo directly from a vessel to a point of rest in the warehouse or storage area or directly from a vessel to railroad cars or trucks and they are never involved in the moving of cargo from a warehouse or storage area point of rest directly to a vessel or from railroad cars or trucks directly to a vessel, because such activities are allocated jurisdictionally to the men working out of Longshoremen's Deep Sea Local Nos. 325, 1306 or 1610. This stipulation, however, shall not be interpreted as being a stipulation by the claimant that he was not engaged in the loading or unloading of a vessel for purposes of the Longshoremen's & Harbor Workers' Compensation Act Amendments of 1972. Rule No. 1 of the agreement governing the relationship between the Warehousemen's Local Union and the warehouse employers is as follows:

"Warehouse workers shall have jurisdiction over all warehouse work done by the above named employer or employers. They shall have jurisdiction over all carloading and unloading from railroad car to pile and from pile to car, loading and unloading trucks and vehicles when under the jurisdiction of the employer, sewing sacks, recooperage, piling dunnage, segregating and chopping of all freight and bracing all cars when under the jurisdiction of warehouse locals, sweeping and cleaning of warehouse

when under the jurisdiction of employer and all mechanical equipment when under the jurisdiction of the employer."

Similarly, the Deepsea Longshore agreement provides with regard to the definition of longshoring work (as opposed to warehouse, quaymen or other type work) that:

"Longshore work shall constitute the loading and discharging of all sea-going vessels, railroad cars at wharf, fitting ships for grain, livestock, building magazine rooms or securing cargoes of any kind, dismantling ships of any kind of fittings, shifting of cargoes, coal or coke, and all labor connected with the loading and discharging of ship, * * * The important distinction being whether or not the freight is handled once, that is to say, laid down or piled. * * *

These contractual provisions reflect the work agreement described above, whereby no men working out of the Warehousemen's local are engaged in moving cargo directly to or from ships and no deepsea longshoremen handle cargo shoreward after it has been laid down or piled. It is expressly agreed, however, that nothing herein shall preclude Claimant from asserting that he was engaged in the loading or unloading of a vessel for purposes of the Longshoremen's & Harbor Workers' Compensation Act Amendments of 1972.

The foregoing stipulations are entered into by all of the parties and the Solicitor of Labor for the purpose of permitting the jurisdictional question as to the coverage of the Longshoremen's & Harbor Workers' Compensation Act to be resolved by an Administrative Law Judge.

/s/ DIVERSON FORD
Diverson Ford, Claimant

DOWMAN, JONES &
SCHECHTER

/s/ J. WELDON GRANGER
Attorneys for Claimant

P. C. PFEIFFER CO., INC.

/s/ M. ARNAUD
Employer

TEXAS EMPLOYERS'
INSURANCE CORPORATION

/s/ WILL F. CARTER
Insurance Carrier

ROYSTON, RAYZOR, COOK
& VICKERY

/s/ W. ROBINS BRICE
Attorneys for Employer and
Insurance Carrier

OFFICE OF THE SOLICITOR
OF LABOR

James G. Johnston,
Assoc. Solicitor

/s/ JOSHUA T. GILLELAN
Attorneys for the Director, Office
of Workmen's Compensation
Programs

EXHIBIT 1

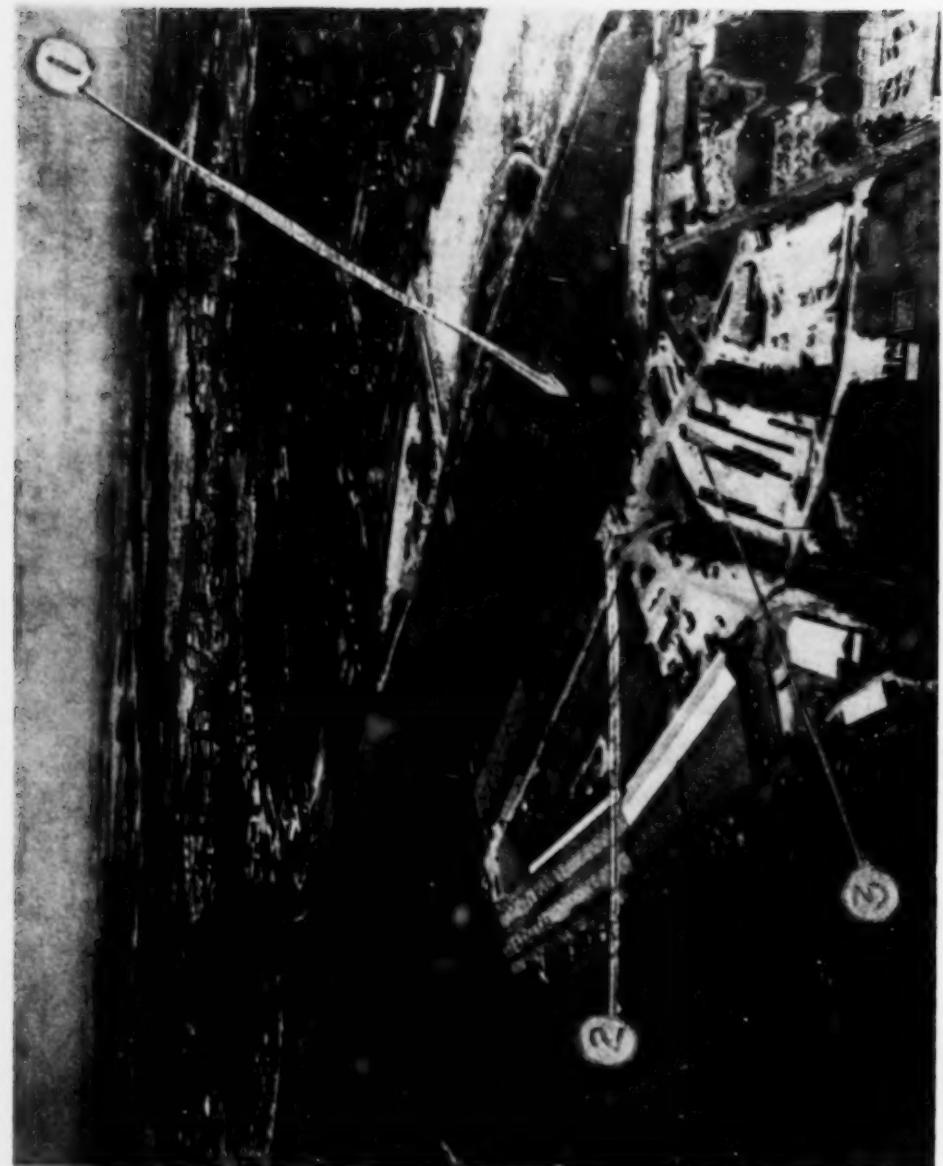


EXHIBIT 1

EXHIBIT 2

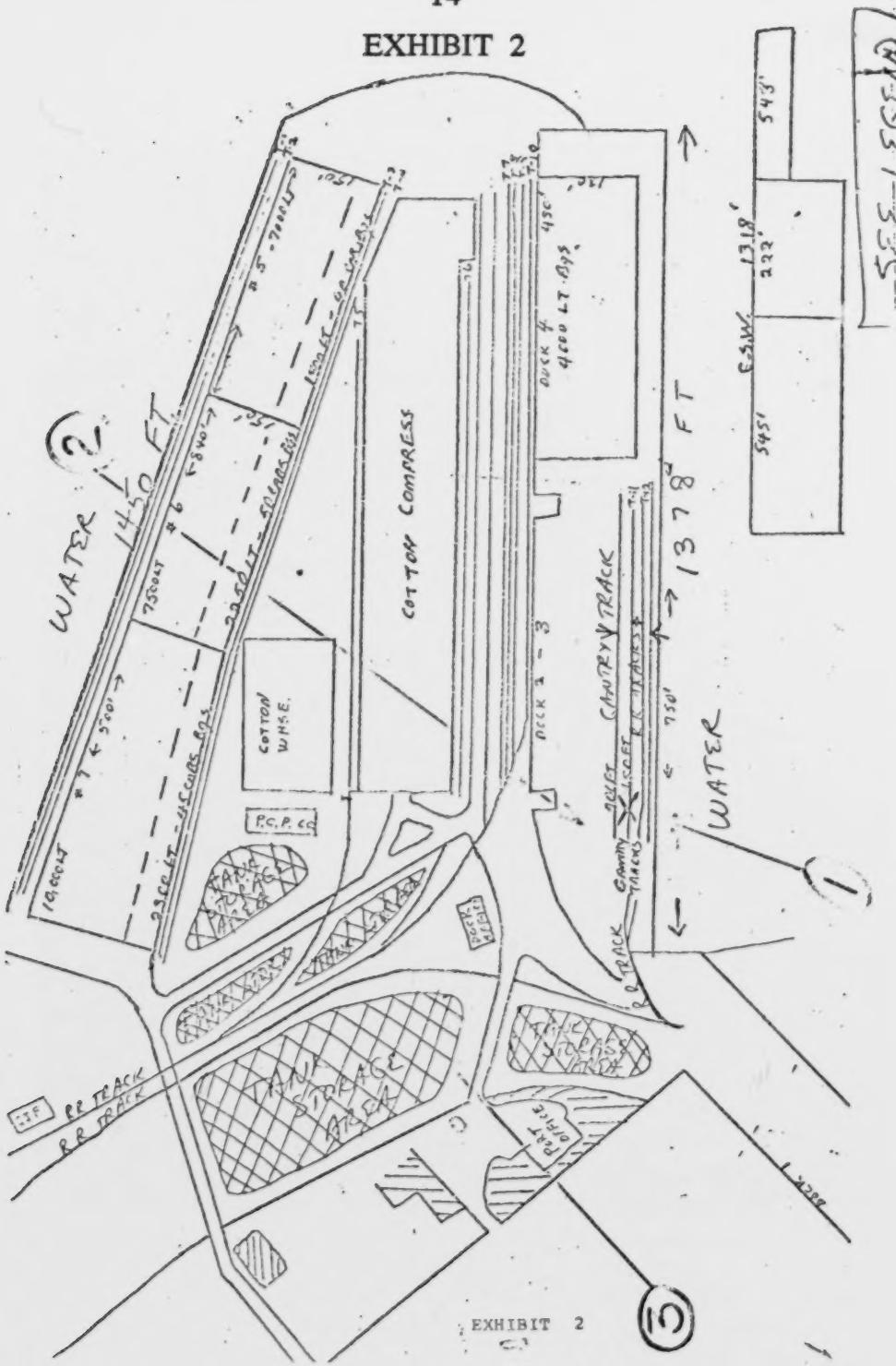


EXHIBIT 2

LEGEND

1. Lines numbered T-1 through T-12 are RR tracks.
2. Lines numbered T-11 and T-12 are RR tracks on docks numbered 2 and 3. These RR tracks run between the gantry tracks and underneath the gantry.
3. The five (5) crosshatched areas are storage areas for army tanks and trucks in the "yard" at Port of Beaumont. (Tanks are stored in these areas from the time they are discharged from a vessel until they are ready for shipment by rail.)
4. Tanks are towed by a tractor up onto docks 2 and 3 from the crosshatched storage area.
5. Gantry will pickup tank and place on flatcar sitting on tracks T-11 and/or T-12.
6. Tanks are secured on flatcars at some location, T-11 and/or T-12.
7. Flatcars will then be towed from Port of Beaumont to destination.

DEPARTMENT OF LABOR
 OFFICE OF WORKMEN'S COMPENSATION
 PROGRAMS
 BEAUMONT, TEXAS

74-LHCA-181
 File No. 8-18874

DIVERSON FORD, Claimant

v.

P. C. PFEIFFER COMPANY, INC.
 Employer, and
 TEXAS EMPLOYERS' INSURANCE
 ASSOCIATION, Insurance Carrier

SUPPLEMENTAL AGREED STATEMENT
 OF FACTS AND STIPULATIONS

Pursuant to inquiry from the Honorable Frank W. Vanderheyden, the Administrative Law Judge hearing the captioned case, the Claimant, the Employer, the Insurance Carrier and the Director, Office of Workmen's Compensation Programs, by and through their attorneys of record, stipulate and agree to the following additional facts for the purpose of permitting this jurisdictional dispute to proceed to decision by the Administrative Law Judge.

I.

Claimant Diverson Ford was working as a warehouseman on the morning of his accident, but "claimant has

worked in the stevedoring division of P. C. Pfeiffer aboard deep sea vessels as well as for other stevedoring companies within the Port of Beaumont." (Original Stipulation, Exhibit JX-1, p. 5).

In the year prior to his injury on April 12, 1973, Claimant worked thirty-seven days as a warehouseman for P. C. Pfeiffer Company, two days as a longshoreman for P. C. Pfeiffer Company, two days as a warehouseman for J. J. Flanagan Company, three days as a longshoreman for J. J. Flanagan Company, and two days as a longshoreman for Biehl and Company. Thus he worked a total of 39 days as a warehouseman and 7 days as a longshoreman. He also worked for a beer distributing company and for a construction company in shoreside employment during the year prior to his injury. On no single day did Claimant work both as a warehouseman and as a longshoreman.

II.

Warehouse labor is obtained in the following manner in the Port of Beaumont:

"All warehouse operation orders are received by Pfeiffer from the Port of Beaumont on the basis of an exclusive contract between Pfeiffer and the Port for these warehousing services." (Original Stipulation, Exhibit JX-1, p. 5):

Pfeiffer then determines the number of gangs of warehousemen necessary to perform the ordered work within the ordered time period, and calls the warehousemen's local union business agent to request the necessary number of gangs for the following day's work. A warehouse gang usually consists of five men, including the foreman.

An individual obtains warehouse work by reporting to the Warehousemen's Union hall, 224 Tevis Street, on the morning he wishes to work where he may be chosen by the gang foreman for one of the gangs according to his seniority. If an individual wishes to do longshore work, he reports to one of the longshoremen's union halls at 430 Shamrock, 580 Buford or 1685 Pennsylvania, where he may be chosen by the gang foreman for one of the longshore gangs which have previously been ordered from the longshoremen's local union business agent by one of the stevedoring companies. There is nothing to prevent a man who is not chosen by a gang foreman for warehouse work on a given day from going to the longshoremen's union hall in hope of obtaining a spot from a gang foreman in an unfilled longshore gang, and conversely, a man who is not chosen by a gang foreman for a longshoring job on any given day may go to the warehouse local in hope of finding a warehouseman's gang unfilled for that particular day. Employers, however, simply order gangs of labor from the union business agent appropriate to the type of work to be performed, and cannot choose or order any particular gang foreman or any individual to work in a particular work classification. Gangs hired from the longshore locals cannot be assigned to do warehousemen's work, and gangs hired from the warehouse local cannot be assigned to do longshoremen's work. Pfeiffer's Warehouse Division orders the necessary warehouse gangs, while separate personnel in the Stevedoring Division order the longshore gangs from the longshore locals, and

"Pfeiffer's Warehouse Division is located within the offices of the Port of Beaumont Navigation District and thus is physically separated from the Stevedoring

Division of the Company." (Original Stipulation, Exhibit JX-1, p. 5.)

The foregoing facts are stipulated and agreed to by the parties by and through their attorneys of record.

DOWNMAN, JONES &
SCHECHTER

/s/ J. WELDON GRANGER
Attorneys for Claimant,
Diverson Ford
ROYSTON, RAYZOR, COOK
& COOK

/s/ W. ROBINS BRICE
Attorneys for P. C. Pfeiffer Company, Employer, and Texas Employers' Insurance Agency, Insurance Company

OFFICE OF THE SOLICITOR
OF LABOR

/s/ JOSHUA T. GILLELAN
Attorney for Director, Office of
Workmen's Compensation
Programs

U.S. DEPARTMENT OF LABOR
 OFFICE OF ADMINISTRATIVE LAW JUDGES
 Washington, D.C. 20210

In the Matter of DIVERSON FORD, Claimant

v.

P. C. PFEIFFER COMPANY, Employer
 TEXAS EMPLOYERS' INSURANCE ASSOCIATION
 Carrier

Case No. 74-LHCA-181
 Formerly Case No. 8-18874

J. Weldon Granger, Esq.
 Downman, Jones, Musslewhite
 and Schechter
 1200 Houston First Savings Bldg.
 711 Fannin
 Houston, Texas 77002
 For the Claimant

W. Robins Brice, Esq.
 Royston, Rayzor, Cook & Vickery
 3710 One Shell Plaza
 Houston, Texas 77002
 For the Employer and Carrier

Joshua T. Gillelan, Esq.
 Solicitor of Labor
 U.S. Department of Labor
 Washington, D.C. 20210
 For the Director, Office of
 Workmen's Compensation Programs

Before: FRANK W. VANDERHEYDEN
 Administrative Law Judge

DECISION AND ORDER

STATEMENT OF THE CASE

Pursuant to the provisions of the Longshoremen's and Harbor's Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.* (hereinafter Act) and the Rules and Regulations promulgated thereunder, a hearing in the subject matter was held before me on June 12, 1974, in Beaumont, Texas. All parties were represented by counsel. A designee of the Solicitor of Labor appeared and participated on behalf of the Director of the Office of Workmen's Compensation Programs pursuant to 20 CFR 702.333(b). At the hearing no witnesses were called. By stipulation of all parties including, but not limited to, the Claimant, the case was submitted on a document entitled Agreed Statement of Facts and Stipulations (JX-Joint Exhibit-1) which was received into evidence (hereinafter sometimes referred to as Stipulation) and oral stipulations. The parties were given a full opportunity to be heard and to make oral arguments. Thereafter, the parties filed proposed findings and briefs which were duly considered. Immediately after the hearing, accompanied by all counsel, I went to City Dock No. 2, Port of Beaumont, and reviewed the area in question. Also subsequent to the hearing, I requested counsel for the parties to clarify an aspect of the Claimant's employment which was done by another document designated as Supplemental Agreed Statement of Facts and Stipulations (JX 2; hereinafter sometimes referred to as a Supplemental Stipulation).

The single issue in this matter is whether or not the claim for compensation comes within the purview of the

Act. The Claimant and the Director of the Office of Workmen's Compensation Programs (hereinafter Director) take the position, that on the facts set forth below, the Claimant is an "employee" for reason that he meets the definition of such in the Act, with additional support for this to be found in the legislative history. For the same reasons, P. C. Pfeiffer Company and Texas Employers' Insurance Group (referred collectively hereinafter as Employer) contend that the Claimant is not an "employee."

Upon the entire record in this case I make the following findings of fact, conclusions of law and order:

FACTS

The pertinent facts, abstracted from the aforementioned Stipulations (altered slightly in form only) are as follows:

The Claimant, Diverson Ford, sustained an accidental injury on April 12, 1973, in the course and scope of his employment for the Employer, when he struck the tip of his second (middle) finger, left hand, with a hammer. The insurance carrier for the Employer's liability under workmen's compensation is the Texas Employers' Insurance Association. It was agreed that notice of injury was timely given; that claim for compensation was timely filed; that the claim for compensation was timely controverted, and that the Employer furnished medical care for the Claimant.

During the year preceding injury, Claimant had an average weekly wage of \$57.83; that his compensation rate under the Act, if applicable, would be \$57.83 per week for total disability and \$38.56 per week for perma-

gent partial disability. Following the injury Claimant sustained a period of temporary total disability from April 12, 1973, to May 7, 1973, a period of four weeks. The Employer paid Claimant compensation for temporary total disability for four weeks at the weekly rate of \$34.52 per week in the total sum of \$138.08 under the Workmen's Compensation Act of Texas.

The accident which resulted in the injury occurred between the rails of a gantry crane on City Dock No. 2 at the Port of Beaumont, Texas, which is an open concrete apron dock approximately 170 feet in width. The gantry crane runs on permanent rails along the edge of the dock, with two railroad tracks running within the span of the gantry and thus under the boom. The rail of the gantry nearest the water is approximately two feet, seven inches from the edge of the dock, with the distance between the rails of the gantry being 32 feet, two inches. This gantry crane is used in the loading and unloading of vessels, but when no vessel loading or unloading operations are in progress, it is also used in the loading and unloading of railroad cars.

As an attachment to the Stipulation, the parties submitted an aerial photograph of the site in question, designated as Exhibit 1, which photograph purports to show the location of the gantry crane, the concrete dock apron and the vehicle storage area, respectively numbered on the aforementioned Exhibit 1, 2, and 3. Also attached to the Stipulation was Exhibit 2, which was a sketch of the pertinent areas mentioned above, which locations were indicated by the same numbers. At the time the photographs was taken a vessel was at the berth adjacent to the crane and vehicles were stored on

the dock apron itself. Neither of these two noted conditions existed on the morning of Claimant's accident.

Claimant was working as a member of a securing gang out of a warehousemen's local and was engaged in fastening military vehicles onto railroad flat cars in the area between the rails of the gantry crane when the accident occurred. On the date of Claimant's injury, no vessel was docked at City Dock No. 2, and the gantry crane was not in use for any purpose. On the previous day, the crane had been employed to load heavy military vehicles out of a nearby storage area onto railroad flat cars for shipment inland. Some of the military vehicles had been towed or driven from a yard storage area (No. 3 on Exhibits attached to Stipulation) to a spot within the reach of the gantry crane (No. 2 on Exhibits attached to Stipulation) and then had been lifted onto the railroad cars for ultimate transportation to an inland arsenal.

Additionally, Claimant would testify that some, but not all, of the military vehicles loaded aboard the railroad cars came from storage on the dock apron itself. The railroad cars remained overnight under the gantry crane, and Claimant was employed on the following morning as a member of a warehousemen's gang for the sole purpose of securely fastening the military vehicles to the railroad cars. Claimant would testify further that he had been employed in the work of bringing the vehicle back to the crane and placing it on to the rail car on the day prior to his accident. However, the payroll records of the Employer indicate that Claimant was not employed at all on the day prior to his accident. These records indicate Claimant was employed on April 9 and 10, 1973, in a warehouseman capacity shifting bagged

cargo, that he was not employed on April 11, 1973, and that he was employed again in a Warehouseman capacity on April 12, 1973 to secure the military vehicles onto the railroad cars.

The eight vehicles on which the Claimant's securing gang were working had been delivered to the Port of Beaumont on prior occasions and placed in a vehicle storage area near the concrete apron of City Dock No. 2. Some, but not all, of the vehicles may have been stored on the dock apron itself. Seven of the vehicles had been brought to Beaumont by the SS THOMAS JEFFERSON, which sailed from Beaumont on March 26, 1973, and the vehicles had been discharged to the storage yard on March 25 and 26, 1973, seventeen days before Claimant's accident. One of the vehicles had been brought to Beaumont by the SS JAMES, which had completed discharging on the morning of April 10th and had sailed from Beaumont on the afternoon of April 10th, 1973, two days before Claimant's accident. The exact military vehicle on which Claimant was working at the moment of his accident has not been identified but it definitely was one of the eight described above which had come from the vehicle storage yard or from the dock storage area itself. The vehicle on which Claimant was working had been brought from the storage area and loaded aboard the rail flatcar on the day prior to the accident. On the morning of the accident Claimant was engaged solely in securing the vehicle to the rail car for shipment inland.

Claimant was employed by the Warehouse Division of the Employer, a multi-faceted corporation which in its various capacities performs warehousing services for the

Port of Beaumont, contract stevedoring services for various shipping lines and agencies, and shipping agency services for various shipping lines and vessels. Those employees of the shipping agency and contracting stevedoring division of the Employer do have occasion to work aboard vessels on the navigable waters of the United States in the course of their employment, but men employed by the Warehouse Division of the Employer and working out of the warehousemen's local union never go aboard vessels or otherwise work on the navigable waters of the United States. However, Claimant has worked in the stevedoring divisions of the Employer aboard deep sea vessels as well as for other stevedoring companies within the Port of Beaumont.

An individual obtains warehouse work by reporting to the warehousemen's union hall, on the morning he wishes to work where he may be chosen by the gang foreman for one of the gangs according to his seniority. If an individual wishes to do longshore work, he reports to one of the longshoremen's union halls, when he may be chosen by the gang foreman for longshore work which had been ordered previously from the longshoremen's local union business agent by one of the stevedoring companies. There is nothing to prevent a man who is not chosen by a gang foreman for warehouse work on a given day from going to the longshoreman's union hall in hope of obtaining a spot from a gang foreman in an unfilled longshore gang. Conversely, a man who is not chosen by a gang foreman for a longshoring job on any given day may go to the warehouse local in hope of finding a warehouseman's gang unfilled for that particular day.

The Employer determines the number of gangs of warehousemen necessary to perform the ordered work within the ordered time period, and calls the warehousemen's local union business agent to request the necessary number of gangs for the following day's work. A warehouse gang usually consists of five men, including the foreman. An Employer cannot choose or order any particular gang foreman or any individual to work in a particular work classification.

Gangs hired from the longshore locals cannot be assigned to do warehousemen's work, and gangs hired from the warehouse local cannot be assigned to do longshoremen's work. On no single day did Claimant work both as a warehouseman and as a longshoreman.

In the year prior to his injury on April 12, 1973, Claimant worked thirty-seven days as a warehouseman and two days as a longshoreman for the Employer. He also worked two days as a warehouseman, and three days as a longshoreman for J. J. Flanagan Company, and two days as a longshoreman for Biehl and Company. Thus he worked a total of 39 days as a warehouseman and 7 days as a longshoreman. He also worked for a beer distributing company and for a construction company in shoreside employment during the year prior to his injury.

The Employer's Warehouse Division is located within the offices of the Port of Beaumont Navigation District and thus is physically separated from the stevedoring division of the Company. All warehouse operation orders are received by the Employer from the Port of Beaumont on the basis of an exclusive contract between the Employer and the Port.

When a government cargo is involved, whether inbound or outbound, from the Port of Beaumont, the Port is paid for these warehousing services by the Government. When nonmilitary cargo is involved, the Port is paid for these warehousing services by the shipper if the cargo is outbound and by the receiver of the cargo if it is inbound. The Employer's stevedoring operations are conducted directly for shipping agencies or vessels on the basis of bidding for the particular work to be performed. Whenever the peculiar nature or size of the cargo or the exigencies of scheduling require that cargo be loaded directly from a railroad car or truck to a vessel or directly from the vessel to a railroad car or truck, such work is jurisdictionally allocated to the deep sea longshoremen and is necessarily performed by men working out of the deep sea local unions for stevedoring companies. No men working out of the warehousemen's local unions are involved at all in such loading or unloading operations, nor are the Employer's warehouse management personnel involved in such operations.

The Employer had not performed the stevedoring services for either vessel which delivered the military vehicles on which Claimant was working at the time of his accident. The Employer's agency division had performed ship's agent services, but not stevedoring services for the SS THOMAS JEFFERSON, which sailed from Beaumont on March 26, 1973, but the Employer had no connection whatever with the call of the SS JAMES at the Port of Beaumont which ended April 10, 1973. No employees of the Employer had participated in any way in the physical removal of the military vehicles from the ocean going vessels or their transfer to the vehicle storage yard within the terminal area. The ware-

house division of the Employer was retained to load and prepare the vehicles for shipment inland by rail, at which task Claimant was employed when the accident occurred resulting in his injury.

Claimant was working out of Warehousemen's Local 1316. Men working out of the Warehousemen's Local at the warehousemen's rate of pay never go aboard vessels and never approach a vessel's cargo ship. Warehousemen are never involved in the moving of cargo directly from a vessel to a point of rest in the warehouse or storage area or directly from a vessel to railroad cars or trucks and they are never involved in the moving of cargo from a warehouse or storage area point of rest directly to a vessel or from railroad cars or trucks directly to a vessel. Such activities are allocated jurisdictionally to the men working out of Longshoremen's Deep Sea Local Nos. 325, 1306 or 1610. However, counsel were in accord that the Stipulation shall not be interpreted as being an agreement by the Claimant that he was not engaged in the loading or unloading of a vessel for purposes of the Act. Rule No. 1 of the agreement governing the relationship between the Warehousemen's Local Union and the warehouse employers is as follows:

"Warehouse workers shall have jurisdiction over all warehouse work done by the above named employer or employers. They shall have jurisdiction over all carloading and unloading from railroad car to pile and from pile to car, loading and unloading trucks and vehicles when under the jurisdiction of the employer, sewing sacks, reconditioning, piling dunnage, segregating and chopping of all freight and bracing all cars when under the jurisdiction of warehouse

locals, sweeping and cleaning of warehouse when under the jurisdiction of employer and all mechanical equipment when under the jurisdiction of the employer."

The Deep Sea Longshore agreement provides, with regard to the definition of longshoring work (as opposed to warehouse, quaymen or other type work), that:

"Longshore work shall constitute the loading and discharging of all sea-going vessels, railroad cars at wharf, fitting ships for grain, livestock, building magazine rooms or securing cargoes of any kind, dismantling ships of any kind of fittings, shifting of cargoes, coal or coke, and all labor connected with the loading and discharging of ship, * * * The important distinction being whether or not the freight is handled once, that is to say, laid down or piled. * * * "

These contractual provisions reflect the work arrangement described above, whereby no men working out of the Warehousemen's local are engaged in moving cargo directly to or from ships and no deep sea longshoremen handle cargo shoreward after it has been laid down or piled. However, it is expressly agreed, that nothing in the Stipulation shall preclude Claimant from asserting that he was engaged in the loading or unloading of a vessel for purposes of the Act.

It was also stipulated orally between the parties at the hearing, and I so find, that the Claimant sustained permanent partial disability to the second (middle) finger of his left hand to the extent of twenty percent over a six-week period of \$38.56 per week for a total amount of \$231.36.

I find the foregoing facts have been established by the entire record in this case.

OPINION

With regard to the issue presented, the pertinent provisions of the Act are as follows:

Section 902. Definitions

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged in by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading and unloading, repairing, or building a vessel).

Section 903. Coverage

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

The legislative history of the Act concerning the point in contention discloses the following:

The intent of the Committee is to permit a uniform compensation system to apply to employees *who would otherwise be covered* by this Act for part of their activity. To take a typical example, cargo whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does *not* intend to cover employees who are not engaged in loading, *unloading*, repairing, or building *a vessel*, *just because* they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up *stored cargo for further trans-shipment* would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. *Likewise* the Committee has *no* intention of extending coverage under the Act to individuals who are *not* employed by a person who is an *employer*, i.e., a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus an individual employed by a person *none* of whose employees work, in whole or part, *on navigable waters*, is not covered *even if* injured on a pier adjoining navigable waters. S. Rep. No. 92-1125, 92 Cong. 2d Sess. 13; H. Rep. No. 92-1441, 92 Cong. 2d Sess. 10-11 (1972). (emphasis supplied)

One of the main reasons for the 1972 amendments to the Act is rooted in those decisions which premised coverage upon *situs* alone. To illustrate, in *Swanson v. Marra Bros, Inc.*, 328 U.S. 1 (1946), it was held that the Act did not cover a longshoreman injured on a dock even if the injury was caused by a vessel on navigable waters. This distinction between a longshoreman's activities aboard a vessel and his work on the pier was reaffirmed in *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 224 (1969), which was the Court's last enunciation on the point before the Act was amended in 1972. There the Court reiterated that Congress chose the line separating water from land at the edge of the pier. "The invitation to move the line landward must be addressed to Congress, not to this Court". To correct an apparent inequity, depending upon the happenstance of where a longshoreman was injured, Congress, among other changes, amended the Act to extend the geographic coverage landward. Congress also altered the definition of "employee" from a negative concept, where certain classes of people were excluded, to a positive statement setting forth certain conditions that a claimant must meet. Capsulizing the character of the changes in Sections 902 (2), (3) and 903, it would appear fair to state that while "situs" was expanded, "status" was constricted. The language of these amended Sections, coupled with the legislative history, however, make it palpable that Congress, in its effort to provide a uniform compensation system, did not intend to open the floodgates of coverage to any and all who met with injury or death upon the newly extended area.

There is agreement between the parties, and I so find, that the Claimant sustained his injury upon an area

which meets the requirements of Section 903(a). The parties begin with the absolute certainty, however, that the case hinges completely upon the definition of "employee". In the main this is so but for reasons mentioned below there are other considerations which are of some moment to the resolution of the issue.

Admittedly, labels attached to a job are not decisive and it is the nature of the work performed by the Claimant that is important. *Olvera v. Miachalos*, 307 F.Supp. 9 (S.D. Tex. 1968). Nonetheless, a job title at times is of assistance in determining the nature of a claimant's work. Also helpful in this respect are the terms of a union agreement. The contract provisions of the Warehousemen's and Deep Sea Longshore Agreement, above mentioned, and in fact the work performed, disclose a dichotomy which delineates distinctly the duties between longshoremen and warehousemen in the Port of Beaumont. The Deep Sea Longshoremen handle all loading and unloading of ships and are not involved in any movement of cargo on land after it has been removed from the ship and taken to a place storage or rest in a warehouse or terminal area. The longshoremen in loading a vessel transport the cargo solely from its place of storage in the warehouse or terminal area to the side of the vessel and place it aboard the ship. Warehousemen do not remove cargo from a vessel, or after its removal from the vessel to a warehouse or storage area. Nor do they move cargo from a warehouse or storage area point of rest directly alongside the vessel nor place it aboard same. Such work is exclusively within the jurisdiction of the Deep Sea Local.

In drafting the definition of "employee" we must indulge in the presumption that Congress in its wisdom

selected such significant words or phrases as "engaged in", "maritime employment" and "longshoreman" most carefully. For example, rather than choose a word of flexible meaning such as "affecting", the phrase "engaged in" was selected, with the reasonable implication being that a claimant must have something more than an indirect relationship with "maritime employment". The term "longshoreman" poses less of a problem and is deemed generally to be a laborer employed about the wharves of a port, especially in loading and unloading vessels. *Sulovitz v. U.S.*, 64 F. Supp. 637 (E.D. Pa. 1945).

No general rule had been fashioned sufficiently comprehensive to describe all the types of employment which are deemed maritime in nature. Outside of certain generally recognized fields, each case must be determined by its particular facts and circumstances. *Ellis v. Gulf Oil Corporation*, 48 F. Supp. 771, 772 (D.N.J. 1943). However, "[t]he management of the vessel, the loading [unloading] of same, the care of its equipment and cargo, the performance of any task essentially to enable it to accomplish its purpose upon navigable waters are within the term 'maritime employment'." *Massman Const. Co. v. Basset*, 30 F. Supp. 813, 815 (E.D. Mo. 1940), *rev'd. on other grounds*, 120 F.2d 230 (8th Cir. 1941), *cert. denied*, 314 U.S. 648 (1941).

Slight succor is found in general statements, however. The key to the present conundrum is to lay the facts concerning Claimant's employment and the Employer's activities alongside the statutory definitions and the legislative history. In the Senate and House Reports aforementioned, it is stated expressly that the Committee did

not intend to cover employees who are not engaged in unloading a vessel just because they are injured in an area adjoining navigable waters and whose only responsibility is to pick up stored cargo for further transhipment. Likewise the Committee had no intention of extending coverage to individuals who were not employed by a person who was an employer. For example, an individual employed by a person none of whose employees work in whole or in part, on navigable waters, even if injured on a pier adjoining navigable waters.

On the facts before us, Claimant and his warehousemen coworkers were not, as I interpret the definitions forementioned and the legislative history, engaged in either "maritime employment" or in "unloading" a vessel. The duties of Claimant and his fellow warehousemen, by the terms of the collective bargaining agreement, and in actuality, did not require them and, in fact, prohibited them from performing any unloading of vessels.

We are reminded in Claimant's brief that "any intermediate step prior to the final removal from the maritime facility is to be considered a 'maritime operation' under the Act". This conclusion is arrived at apparently because the Claimant was working near the water and alleged to be engaged in the final stages of unloading a vessel, a pregnant idea distinguished more by the ingenuity of its conception than by the strength of its persuasion. Rather than "unloading" a vessel, the facts could support reasonably the conclusion that the Claimant was engaged in the first stages of loading cargo for a consignee which cargo had already been physical or constructively delivered to such party. In this regard, it is of interest to note that the Stipulation states the

receiver of the cargo pays for the warehousing services. Stripped to its essentials, Claimant's duties were confined completely to land, where on the day in question his sole function was to affix the cargo (military tanks) to railroad flatcars for trans-shipment inland. As such, Claimant's "maritime employment" was nebulous to nonexistent.

I find also that the Claimant was not working for an "employer" as this term is defined in Section 902(4), and as amplified by the Committee Reports, because of the absence of employees "employed in maritime employment". The record shows that employees of the employer had not performed any of the stevedoring services concerning the cargo, nor were such employees involved in transferring the cargo, on which Claimant was working subsequently when injured, to the storage yard within the terminal area. The Employer had merely the warehousing contract to prepare the vehicles for shipment inland by rail. These facts also appear to fall within that portion of the Committee Reports which states: "Thus, an individual employed by a person none of whose employees work, in whole or in part, or navigable waters, is not covered even if injured on a pier adjoining navigable waters".

To the writer's knowledge none of the jurisdictional questions under the aforementioned Sections of the Act have decided to date by the Benefits Review Board or the appropriate Federal Circuit Court of Appeals. Of those decisions on the Administrative Law Judge level possibly analogous to the instant matter is *Giacomo Avvento v. Hellenic Lines and Liberty Mutual Insurance Company*, 74-LHCA-63, which is cited in, and attached

to, the Director's brief to support the position Claimant is an "employee". However, there are at least two powerful and persuasive distinctions between *Avvento* and this case. First, and most important, in *Avvento* the claimant, a "legman" engaged in loading cases of sardines into a truck on the particular day of the accident, was a *longshoreman* and because of the interchangeability of jobs, could within the same day be assigned to the task of directly unloading a vessel. Not so with the Claimant here, whose duties were that of a warehouseman, pure and simple, having an attenuated link at best with the vessel from which cargo emanated. Second, the longshoreman in *Avvento* was found not to be picking up "stored cargo". Here the vehicles the Claimant was affixing to the flatcars could, on the facts set forth, in the Stipulation, be reasonably considered, and I so find, to be stored cargo. More recently, on the administrative law level, there was decided *James R. Bailey v. Nacirema Operating Company, Inc. and Liberty Mutual Insurance Company*, 74-LHCA-117, which in some regard is similar to the instant matter and also involved a jurisdictional issue. Again, however, the facts are significantly different. In *Bailey*, though engaged on the day of the accident in a process involving, "stuffing", i.e., loading logs onto a Moffet Trailer, the claimant was a *Longshoreman*, "frequently assigned to a regular longshoremen's gang, for work either aboard ship or on a dock, handling cargo". *Litwinowicz v. Weyerhaeuser Steamship Company*, 179 F. Supp. 812 (E.D. Pa. 1959), is cited also in the Director's brief, for the proposition that "loading" should not be given a niggardly construction. However, there the plaintiff, a *longshoreman*, was injured while working in a railroad car placing wooden chocks under

a draft of steel beams *preparatory* to their being hoisted *aboard* a ship. These facts are strikingly dissimilar from those before us.

Related in the briefs of counsel for Claimant and the Director are the following cases: *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *Young & Co. v. Shea*, 397 F.2d 185, 188 and 404 F.2d 1059, 1061 (5th Cir. 1968); *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 130 (1962). These are mentioned for the thesis that the Act, should be construed liberally in favor of injured workmen and that it should be read expansively. To these one might add, to mention a few, *Reed v. S. S. Yaka*, 373 U.S. 410, 415, (1963); *Michigan Mutual Liberty Co. v. Arrien*, 344 F.2d 640, 647 (2d Cir. 1965) and *Gibson v. Hughes*, 192 F. Supp. 564, 571 (S.D.N.Y. 1961). Notwithstanding that these cases were decided before the Act was amended it is conceded that it remains a remedial statute to be construed broadly. However, such generous construction should not be employed to frustrate the Congressional intent as evidenced by new definition of "employee" and the Committee Reports.

Cardillo v. Liberty Mutual Ins. Co., 330 U.S. 460, 474 (1947) is also cited for the Section 20(a) presumption "that a claim comes within the provisions of this Act." However, the prefatory language to this give rise to such presumption only "in the absence of substantial evidence to the contrary". The record will show, and I so find, that the Employer has come forward with such evidence.

From the foregoing findings of facts, conclusions of law and upon the evidence contained in the record as a whole I make the following:

ORDER

The claim for compensation by Diverson Ford under the Longshoremen's and Harbor Workers' Compensation Act against P. C. Pfeiffer Company, Inc., and Texas Employers' Insurance Association is hereby denied.

/s/ FRANK W. VANDERHEYDEN
 Frank W. Vanderheyden
 Administrative Law Judge

Dated: August 29, 1974
 Washington, D. C.

U.S. DEPARTMENT OF LABOR
 BENEFITS REVIEW BOARD
 Washington, D.C. 20210

(SEAL)

BRB Nos. 74-191 and 74-191A

DIVERSON FORD
 Claimant-Petitioner

v.

P. C. PFEIFFER COMPANY, INC.
 and

TEXAS EMPLOYERS' INSURANCE ASSOCIATION
 Employer/Carrier-Respondents

DIRECTOR, OFFICE OF WORKERS' COMPENSA-
 TION PROGRAMS, UNITED STATES
 DEPARTMENT OF LABOR
 Petitioner

v.

P. C. PFEIFFER COMPANY, INC.
 and

TEXAS EMPLOYERS' INSURANCE ASSOCIATION
 Employer/Carrier-Respondents

Appeal from Decision and Order of Frank W. Van-
 derheyden, Administrative Law Judge, United States
 Department of Labor.

J. Weldon Granger (Downman, Jones and Schech-
 ter), Houston, Texas, for the claimant.

W. Robins Brice and E. D. Vickery (Royston, Rayzor, Cook and Vickery), Houston, Texas, for the employer/carrier.

Joshua T. Gillelan (William J. Kilberg, Solicitor of Labor, Marshall H. Harris, Associate Solicitor), Washington, D. C., Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Washington, Chairperson:

DECISION

These appeals by the claimant and the Director, Office of Workers' Compensation Programs, are from the decision and order (74-LHCA-181) of Administrative Law Judge Vanderheyden denying compensation benefits pursuant to a claim filed under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereinafter referred to as the Act).

Claimant, employed as a warehouseman, injured a finger in 1973 while securing military vehicles onto railroad cars located on a concrete aprondock for inland shipment. The vehicles with which claimant was working had been unloaded from ships between two days and two and one-half weeks prior to the injury. The employer and carrier (hereinafter referred to as the employer) controverted the claim on the sole ground that the claim did not come within the provisions of the Act.

The administrative law judge found that the claimant was not an employee as described in Section 2(3) of

the Act, 33 U.S.C. § 902(3), and that the employer was not an employer as described in Section 2(4) of the Act, 33 U.S.C. § 902(4), and therefore denied compensation. The claimant and the Director appeal alleging that the 1972 amendments to the Act expanded coverage inland to include anyone, such as the claimant, engaged in longshoring operations.

Employer's argument that neither the claimant nor any other of the employer's employees were working over navigable waters on the date of the injury assumes that the coverage of "navigable waters" has come through the amendments unscathed. Such an assumption is unfounded since the language of amended Section 3(a) of the Act, 33 U.S.C. § 903(a), and amended Section 2(4) of the Act, 33 U.S.C. § 902(4), both apply to employment "upon the navigable waters of the United States (*including* any adjoining pier, wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)". (emphasis added).

The employer undisputedly had employees working in a geographical area within the scope of Sections 3(a) and 2(4). The Board finds it unnecessary to find, as urged by the employer, that at least one employee of the employer must be actually working *over* the water with a ship at the dock before an employer is determined to have employees employed over navigable waters within the provisions of amended Section 2(4) of the Act. The Board's inquiry is therefore directed to the claimant's duties on the date of the injury to determine whether he was engaged in maritime employment, because Section 3(a) having been satisfied, a determination of coverage

of an "employee" under Section 2(3) will implicitly satisfy the requirements of Section 2(4). *Harris v. Maritime Terminals and Aetna Casualty*, 1 BRBS 301, BRB No. 74-178 (Feb. 3, 1975).

Section 2(3) of the Act, as amended, defines an employee as:

Any person engaged in maritime employment, *including* any longshoreman or any other person engaged in *longshoring operations*. . . . (emphasis added).

This Board has found that longshoring operations include intermediate steps subsequent to unloading cargo, still in maritime commerce, from a ship and prior to its removal from the terminal for further transshipment. *Avvento v. Hellenic Lines Ltd.*, 1 BRBS 174, BRB No. 74-153 (Nov. 12, 1974). The very language of amended Section 2(3) includes anyone engaged in longshoring operations in the definition of an employee. The Board finds that the cargo with which the claimant was working was still in maritime commerce. *Avvento, supra*; *Adkins v. I.T.O.*, 1 BRBS 199, BRB No. 74-123 (Nov. 29, 1974). The claimant in *Avvento* was performing the same type of work as here, loading cargo which had previously been unloaded from a ship into a truck for removal from the pier. The fact that the claimant in *Avvento* was hired as a longshoreman and the claimant here was hired as a warehouseman is in no way a distinction under the Act. See *Coppolino v. I.T.O.*, 1 BRBS 205, BRB No. 74-136 (Dec. 2, 1974). It is the function of the employment, such as longshoring operations, and the situs of the injury that is controlling, not the title of the position.

The Board does not subscribe to a "point of rest" determination that the moment that cargo is unloaded from a ship and placed onto the dock, it ends its maritime nature. *Avvento, supra*. Any intent to limit coverage to persons actually involved with the loading and unloading of ships between the stringpiece and the hold of the ship could have been so expressed by Congress. *Coppolino, supra*.

The Board finds that the administrative law judge erred in finding that the claimant was not engaged in employment within the scope of the Act. Therefore, the decision and order appealed from is reversed and the case is remanded to the office of the Administrative Law Judges for further appropriate action.

/s/ RUTH V. WASHINGTON
Ruth V. Washington, Chairperson

We Concur:

/s/ RALPH M. HARTMAN
Ralph M. Hartman, Member

/s/ JULIUS MILLER
Julius Miller, Member

Dated this 21st day
of March, 1975

(Jurat Omitted in Printing)

DEPARTMENT OF LABOR
 OFFICE OF WORKMAN'S COMPENSATION
 PROGRAMS
 GALVESTON, TEXAS

File No. 8-18217

WILL BRYANT, Claimant

v.

AYERS STEAMSHIP CO., INC., Employer, and
 TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
 Insurance Carrier

AGREED STATEMENT OF FACTS
 AND STIPULATIONS

On May 2, 1973, Mr. Will Bryant was injured while employed by Ayers Steamship Co., Inc. at Galveston, Texas. The sole issue for determination at this time is whether this injury occurred within the jurisdiction of the Longshoremen's & Harbor Workers' Compensation Act or within the jurisdiction of the Texas Workman's Compensation Statute. The Claimant, Will Bryant, and the Employer, Ayers Steamship Co., Inc., and its Insurance Carrier, Texas Employers' Insurance Association, stipulate and agree to the following facts for the purpose of permitting this jurisdictional dispute to be submitted to an administrative law Judge for decision:

I.

The accident occurred in a warehouse immediately adjacent to Pier 23, Port of Galveston, Texas. The pier adjoins the navigable waters of the United States. In the Port of Galveston, cotton is received by various shoreside cotton compress-warehouses from the inland shippers of cotton. The cotton is then drayed by trailers to the pier warehouses. When it arrives at the pier warehouses, the driver of the dray of trailers, together with two "headers" take the cotton off the trailers and move it to the designated place in the pier warehouse assigned by the agents operating or having control of that pier-side warehouse. In some instances, the cotton is so drayed and stored when no particular vessel is designated for the eventual receipt of the cotton from the pierside warehouse though eventually all bales so placed are shipped out on navigable waters. It is stored as stated and left until it is moved by longshoremen, not *cotton headers*, to shipside. After the headers take the cotton off the compress trailers and put it to rest in the pier warehouses they do not touch it again. When the vessel comes in, the cotton is moved to shipside for loading and the "headers" have absolutely nothing to do with that operation.

II.

At the time of this accident, Bryant was rolling a bale along a special purpose cotton dray wagon to the edge of the wagon where it might be tipped up and headed off the wagon. The driver (an employee of Bluebonnet Warehouse) who had brought the cotton dray wagon to the warehouse was assisting him. A "spider" from the band-

ing on the bale caught Bryant's glove and pulled him along with the rolling bale so that his right hand was caught between two bales. Bryant sustained a fracture to the 5th Metacarpal bone in his right hand, among other injuries to the hand.

III.

Cotton headers are employed solely to unload cotton bales from shoreside transportation and store it in pierside warehouses. The Cotton Headers Union Contract provides:

"It is recognized and agreed that breaking down cotton stacked for loading aboard ship is longshore work."

This contract provision is consistent with the custom of the port that movement of the cotton from pierside warehouse storage points to the ships is allocated jurisdictionally to the longshoring locals. Rule 20 Deepsea and Cotton Agreement which defines longshore work as "including all men who truck cargo direct to and from pile or car or to and from shipside or hatches" is completely consistent with this recognized industry practice. The "headers" never move the cargo from the pile to the ship. In addition, all direct loading from shoreside transportation onto the vessel is performed solely by deepsea longshoremen and not by cotton headers. Cotton headers work only to bring the cotton from a compress to a point of rest or pile in a pierside warehouse from which it is then shipped upon navigable waters. Bryant was performing cotton header or warehouse work and not longshore work at the time of his injury. He was not involved

in the loading of the ship insofar as industry practice is concerned, but this stipulation shall not prevent Bryant from contending that he was involved in the loading of the ship.

IV.

Bryant has worked exclusively as a cotton header or quayman out of Local 1308 for the past five or six years and has done no longshoring work. His work has on no occasion required him to go aboard a vessel on the navigable waters of the United States.

V.

The employer, Ayers Steamship Co., Inc., is a ship agency company and does not furnish stevedoring services to vessels. It does not employ longshoremen to load or unload vessels. In the event a vessel owner for whom Ayers is agent desires for it to arrange for stevedoring services, Ayers contracts with independent contracting stevedoring companies to perform the longshoring services of loading or unloading the vessel.

VI.

The cotton on which Bryant was working at the time of his accident was being stored in the pierside warehouse in anticipation of the arrival of the SS KOREAN EXPORTER. The vessel was not in port at the time of the accident and did not arrive at the dock until May 7, 1973. Although much of the cotton stored in the pierside warehouse during the period prior to the vessel's arrival was eventually shipped aboard the SS KOREAN EXPORTER, some of the cotton cargo of that vessel was

made up of cotton which had been stored in the pierside warehouse in anticipation of previous arrivals of various other ships. Additionally, some of the cotton stored in the pierside warehouse in anticipation of the arrival of the KOREAN EXPORTER was diverted to other vessels at other piers from its storage location of the pierside warehouse. This involved re-draying the cotton to another pierside warehouse, re-heading the cotton by cotton headers and storing it in another location, and then longshoremen removing the stored cotton from the second warehouse and loading it aboard a vessel. The cotton which Bryant was actually heading at the moment of his accident on May 2, 1973 was in fact loaded aboard the KOREAN EXPORTER by longshoremen on May 7, 1973. The loading of the KOREAN EXPORTER was accomplished by longshoremen employed by Young & Company, an independent contracting stevedoring corporation in no way affiliated with Ayers Steamship Co., Inc. Young & Company was employed by the vessel's operator to provide the loading services for the vessel.

VII.

Bryant's employer, Ayers Steamship Company, Inc., operates as a steamship agency and as a terminal operator. As a steamship agency, it has employees who necessarily board ocean-going vessels and perform portions of their duties on the navigable waters of the United States. As a terminal operator, Ayers receives cargo for eventual loading aboard a vessel and stores it in a pierside warehouse until space aboard a vessel is ready to receive it and until longshore labor is available to load the cargo. To perform its terminal operations in Galveston, Ayers employs cotton headers and quaymen from

Local 1308. Quaymen perform cargo shifting operations from one storage location to another storage location within the pierside warehouses, but they do not perform longshore work. Cotton headers and quaymen are not required to board ocean-going vessels nor to deliver cargo to them in the course of their duties and never work on vessels or on the navigable waters of the United States though much of their work will be performed adjacent thereto. The task of moving cargo from a pierside warehouse storage location to shipside for loading aboard a vessel is allocated jurisdictionally to the longshoring unions and is performed by longshoremen employed by stevedoring companies from the Galveston locals. Ayers itself does not perform any stevedoring services.

BRIEFING SCHEDULE

It is agreed that the Claimant will submit its Brief on or before November 15, 1973. The Employer's Insurance Carrier will file its Reply Brief on or before November 30, 1973. The Claimant will file a Reply Brief, if any, on or before December 17, 1973.

Executed by the Claimant and his attorneys on this the 17th day of October, 1973.

Executed by the Employer, Insurance Carrier and their attorneys on this the 24th day of September, 1973.

/s/ **WILL BRYANT**
Will Bryant, Claimant

DOWMAN, JONES &
SCHECHTER

/s/ **ARTHUR L. SCHECHTER**
Arthur L. Schechter
Attorneys for Claimant

AYERS STEAMSHIP CO., INC.

/s/ **ARLY J. BANQUER**
Employer
TEXAS EMPLOYERS' IN-
SURANCE CORPORATION

/s/ **WILL T. CARTER**
Insurance Carrier
ROYSTON, RAYZOR, COOK &
VICKERY

/s/ **E. D. VICKERY**
Attorneys for Employer and
Insurance Carrier

DEPARTMENT OF LABOR
OFFICE OF WORKMEN'S COMPENSATION
PROGRAMS
GALVESTON, TEXAS

File No. 8-18217

WILL BRYANT
Claimant

v.

AYERS STEAMSHIP CO., INC., Employer, and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Insurance Carrier

SUPPLEMENTAL AGREED
STIPULATIONS OF FACT

Comes now Will Bryant, Claimant, and Ayers Steamship Co., Inc., employer and Texas Employers' Insurance Association, the insurance carrier in the above captioned and numbered cause and through their attorneys do make and enter into the following Stipulations of Fact, without prejudice to the rights of any party with respect to the jurisdictional issue or their rights to appeal on such issue:

I.

It is hereby stipulated and agreed that the Claimant, Will Bryant, on May 2, 1973, sustained an accidental injury in the course and scope of his employment for the Ayers Steamship Co., Inc. in the City of Galveston, Texas. It is further stipulated that Texas Employers' Insurance Association had in effect, subject to the resolu-

tion of the jurisdictional question in the above claim, Workmen's Compensation Insurance, covering employees of the Ayers Steamship Co., Inc.

II.

It is further stipulated and agreed that notice of injury was timely given, that claim for compensation was timely filed and that the employer and its insurance carrier have furnished such medical care and attention as the nature of the injury and the progress of recovery have required.

III.

It is further stipulated and agreed that during the year next preceding injury, the Claimant, Will Bryant, had an average weekly wage of \$166.69, and his compensation rate under the Longshoremen's Act would be \$111.13 per week; that following the injury in question, he sustained a period of temporary total disability from May 4, 1973 to June 29, 1973, a period of eight weeks, for which compensation under the Longshoremen's Act would amount to \$889.04; that under the medical evidence in the case, the Claimant, Will Bryant, has a partial permanent disability of 10% to his right hand, for which compensation under the Longshoremen's Act would amount to 24.4 weeks at \$111.13 per week in the total sum of \$2,711.57; that the total amount of compensation owed if jurisdiction is determined to exist under the Longshoremen's Act for the injury of May 2, 1973 is \$3,600.61.

IV.

It is further stipulated and agreed that the Insurance Carrier has paid to the Claimant compensation for temporary total disability for 8 weeks at the maximum weekly rate of \$49.00 per week in the total sum of \$392.00 under the Workmen's Compensation Act of Texas; that if jurisdiction is found to exist under the Longshoremen's Act, the Employer and Insurance Carrier are entitled to a credit in this amount against the agreed upon figures as to compensation under the Longshoremen's Act; that whatever additional compensation, if any, Claimant may be entitled to under the Texas Act if jurisdiction is found not to exist under the Longshoremen's Act will be determined after any party has exhausted whatever appellate procedures they may take on the jurisdictional issue in this claim.

V.

It is further agreed that nothing in the agreed upon figures will in any way prejudice the right of the Claimant and his counsel to request that attorneys fees be assessed at the appropriate time against the carrier under the Longshoremen's and Harbor Workers' Compensation Act as amended.

Executed by the Claimant and his attorneys on the 13th day of December, 1973.

Executed by the Employer, Insurance Carrier and their attorneys on this the 13th day of December, 1973.

/s/ WILL BRYANT
Will Bryant, Claimant

DOWNMAN, JONES &
SCHECHTER

By /s/ ARTHUR SCHECHTER
Attorneys for Claimant

AYERS STEAMSHIP CO., INC.

By /s/ SELY J. BANQUER
Employer

TEXAS EMPLOYERS'
INSURANCE ASSOCIATION

By /s/ WILL T. CARTER
Insurance Carrier

ROYSTON, RAYZOR, COOK
& VICKERY

By /s/ E. D. VICKERY
Attorneys for Employer and
Insurance Carrier

DEPARTMENT OF LABOR
OFFICE OF WORKMEN'S COMPENSATION
PROGRAMS
GALVESTON, TEXAS

DOCKET NO. 74-LHCA-89
FILE NO. 8-18217

WILL BRYANT, Claimant

v.

AYERS STEAMSHIP CO., INC., Employer, and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Insurance Carrier

SUPPLEMENTAL AGREED
STIPULATIONS OF FACT

At the request of the Honorable James G. Johnston, Associate Solicitor of Labor for Employee Benefits, the Claimant and the Employer and Insurance Carrier submit this Supplemental Agreed Statement of Facts and Stipulations, without either admitting or denying that they are material and/or relevant to the jurisdictional issue in this case, and agree as follows:

1.

Mr. Johnston's Question: "According to industry practice in the Port of Galveston, how frequently is the loading of cotton aboard ships carried out directly from

shoreside transportation, rather than from pierside warehouses into which it has previously been placed by cotton headers?"

Answer: Most of the time cotton is taken from pierside warehouses, though it is sometimes taken directly from shoreside transportation by longshoremen if the vessel on which it is to be shipped is waiting to be loaded.

2.

Mr. Johnston's Question: "If the ship which is to receive the cargo of cotton is docked for loading when the cotton arrives at the pier on dray wagons,

(a) are the pier facilities designed to allow the drays to pull alongside ship for direct transfer of the cotton aboard ship, or must the cotton be taken from the drays and carried through the pierside warehouse?

(b) to what extent is the cotton handled by cotton headers or quaymen?"

Answer: (a) The pier facilities are constructed in a manner which would permit dray wagons or highway motor trucks to pull alongside ship for direct transfer of the cotton aboard ship.

(b) If cotton comes to rest in the warehouse, it is placed there by cotton headers. If cotton does not come to rest in the warehouse, it is not handled at all by cotton headers, though if a vessel is waiting and cotton is taken from a dray on the apron of the pier by longshoremen to a waiting vessel, cotton headers who otherwise would have stored the cotton in the warehouse are paid for each bale so moved by the longshoremen.

3.

Mr. Johnston's Question: "When cotton is placed in a pierside warehouse by cotton headers to await the arrival of a ship, does the terminal operator keep track of the individual bales or lots of cotton, or are they placed in an unsegregated mass from which bales are removed for loading aboard ship without regard to origin?"

Answer: While awaiting the arrival of the ship, the cotton is stored in the warehouse by cotton headers employed by steamship agents such as the Employer herein who keeps track of the individual lots and they are not stored in the warehouse in an unsegregated mass.

4.

Mr. Johnston's Question: "What is the mean period of time, and what is the range of such periods, of 'storage' of cotton bales in pierside warehouses after being placed there by cotton headers for eventual loading aboard ship? Do storage charges accrue for cotton left in such warehouses?"

Answer: The period of time the stored cotton remains in a pierside warehouse after being stored there by cotton headers ranges from less than a day to several weeks. The Employer herein estimates the mean or average period of time as to its own operations to be approximately one week. After a certain number of days of "free time", storage charges accrue. At the warehouse in which claimant's injury occurred, "free time" was 15 days for cotton. Thus, almost all cotton is removed from the warehouse by the end of 15 days and of course, all cotton in the warehouse is eventually shipped out of the Port of Galveston by ship.

5.

Mr. Johnston's Question: "When the available labor force of I.L.A. Locals 329 and 851 has been exhausted and further longshoremen are needed to perform the work of those Locals, are members of Local 1308 hired to perform deep-sea longshoring work?"

Answer: Members of Local 1308, the cotton headers local, are as eligible as anyone else to be hired by Locals 329 and 851 when these deep-sea longshore locals have otherwise exhausted the labor force available to them. In fact, the Claimant Will Bryant has from time to time done such work but not for several years.

6.

Mr. Johnston's Question: "(a) Is the quotation of Deep-sea & Cotton Agreement Rule 20, in § 111 of the Agreed Statement of Facts and Stipulations filed herein, correct in placing the word 'or' between the phrases 'to and from pile or car' and 'to and from shipside or hatches'?

(b) If so, is cotton heading considered longshore work in that it is part of the process of * * * truck[ing] cargo direct to * * * pile * * *?"

Answer: (a) No. The complete text of Rule 20 is quoted below:

"Longshore work shall constitute the loading and discharging of all sea-going vessels, railroad cars at wharf, fitting ships for grain, livestock, building magazine rooms or securing cargoes of any kind, dismantling ships of any kind of fittings, shifting of cargoes, coal or coke, and all labor connected with the loading and discharging of ships, including hoisting cargoes with ships' winches, also including

dinkey or jitney drivers, and loading of ship's stores except when stores are loaded by ship's crew and except at ports where longshoremen are not available. Longshore labor also includes all men who truck cargo direct to and from pile or car to or from the ship's side to hatches. The important distinction being whether or not the freight is handled once, that is to say, laid down or piled. It is mutually agreed when assorting is necessary when discharging the employment of warehouse labor is optional.

When vessel is in loading or unloading berth, or shifting between loading or unloading berths within the confines of a port, the loading and laying of dunnage and the opening and closing of hatches when in connection with the handling of general cargo and/or cotton, is longshore work and will not be done by ship's crew.

The Employers reserve the right to determine by name from a list furnished by the Deep Sea Local Union those persons who will be qualified to be trained to operate Paceco or similar type cranes.

The Employer will select the individual longshoreman by name from a list furnished by the Deep Sea Local Union to operate container machines."

(b) Not applicable.

7.

Mr. Johnston's Question: "Do cotton headers (and, particularly, did claimant Bryant) perform any functions other than transferring cotton from dray wagons, which have come from compress warehouses, to pierside warehouses? Do they move cotton from one location within a warehouse to another? Do they move it from one such warehouse to another? Do they work at any locations other than such pierside warehouses?"

Answer: The only function performed by cotton headers other than transferring cotton from dray wagons or trucks to pierside warehouses is the very infrequent performance of cotton shifting activities within a warehouse for purposes of consolidating the storage and conserving warehouse space. Cotton headers do not move cotton from one warehouse to another, although they may be employed to receive cotton into a warehouse from dray wagons which have come from other pierside warehouses. Cotton headers do not work at any location other than pierside warehouses.

8.

Mr. Johnston's Question: "Does Galveston industry practice recognize a general category of 'harbor workers'? If so, are cotton headers or quaymen considered to be within such general category?"

Answer: As the parties do not understand the question, no answer is made.

Executed by the Claimant and his attorneys on this the 3d day of May, 1974.

Executed by the Employer, Insurance Carrier and their attorneys on this the 7th day of May, 1974.

/s/ WILL BRYANT
Will Bryant, Claimant
DOWNMAN, JONES &
SCHECHTER

By /s/ ARTHUR SCHECHTER
Attorneys for Claimant
AYERS STEAMSHIP CO., INC.

By /s/ SELY J. BANQUER
Employer
TEXAS EMPLOYERS'
INSURANCE ASSOCIATION

By /s/ WILL T. CARTER
Insurance Carrier
ROYSTON, RAYZOR, COOK &
VICKERY

By /s/ E. D. VICKERY
Attorneys for Employer and
Insurance Carrier

U. S. DEPARTMENT OF LABOR
 Office of Administrative Law Judges
 Washington, D.C. 20210

(SEAL)

Case No. 74-LHCA-89 (Formerly Case No. 8-18217)

In the Matter of

WILL BRYANT,
Claimant

v.

AYERS STEAMSHIP COMPANY,
Employer

TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Carrier

Arthur L. Schecter, Esquire
 Dowman, Jones & Schechter
 1200 Houston First Savings Building
 Houston, Texas 77002
For the Claimant

E. D. Vickery, Esquire
 W. Robins Brice, Esquire
 Royston, Rayzor, Cook & Vickery
 3710 One Shell Plaza
 Houston, Texas 77002
*For the Employer
 and Carrier*

William J. Kilberg, Esquire
 Solicitor of Labor

Joshua T. Gillelan, II, Esquire
 Attorney
 United States Department of Labor
 Room 4221, Main Labor Building
 14th & Constitution Avenue, N.W.
 Washington, D.C. 20210

*For Director
 Office of Workmen's
 Compensation Programs*

Before: WILLIAM B. DEVANEY
 Administrative Law Judge

DECISION AND ORDER

Statement of the Case

This is a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, as amended (hereinafter referred to as the Act). The sole issue for determination is jurisdiction, i.e., whether a cotton header, injured while unloading cotton bales from a dray wagon, is subject to the provisions of the Act. All facts, including disability and compensation due if Will Bryant (Claimant) is an employee covered by the Act as amended in 1972, have been stipulated by the parties.¹

1. The parties have entered into three signed stipulations which are hereby incorporated as part of the record as follows:
 Stipulation No. 1, entitled, "Agreed Statement of Facts and Stipulations", executed by Employer, Insurance Carrier and their attorneys on September 24, 1973, and by the Claimant and his attorney on October 7, 1973 (hereinafter referred to as "Stip. 1" followed by the appropriate page of that Stipulation).

A hearing was scheduled for June 4, 1974, in Houston, Texas, but was cancelled at the request of the parties.² A waiver of Oral Argument, duly signed by counsel for the parties was also filed and is hereby incorporated in the record as ALJ Exh. 2. By letter dated July 3, 1974, the parties, including the late Honorable James B. Johnston, were given confirmation of the telegraphic notice of cancellation of the notice of hearing; that the request of the parties that this case be submitted on the agreed stipulations of fact without formal hearing and/or oral argument was granted; and a briefing schedule was set forth. A copy of the letter dated June 3, 1974, is hereby incorporated in the record as ALJ Exh. 3.

Claimant initially filed a brief with the Deputy Commissioner entitled, "Brief and Argument in Support of Will Bryant's Claim for Compensation" and Employer-

Stipulation No. 2, entitled, "Supplemental Agreed Stipulation of Fact", executed by Employer, Insurance Carrier and their attorneys on December 13, 1973, and by Claimant and his attorney on December 13, 1973 (hereinafter referred to as "Stip. 2" followed by the appropriate page of that Stipulation). Stipulation No. 3, also entitled "Supplemental Agreed Stipulation of Fact", executed by Claimant and his attorney on May 3, 1974, and by Employer, Insurance Carrier and their attorneys on May 7, 1974 (hereinafter referred to as "Stip. 3" followed by the appropriate page of that Stipulation).

2. The late Honorable James G. Johnston, Associate Solocitor for Employee Benefits, in a letter to the undersigned dated May 24, 1974, with copies to counsel for the parties, concurred that the three stipulations, more fully described in n. 1, *supra*, "set forth all relevant facts of which we are aware with respect to the claim; none of us desires to adduce any further evidence. Thus on behalf of all parties, we would like to waive, pursuant to 20 C.F.R. § 702.346, the formal hearing which has been scheduled to be held in Houston on June 6, 1974." The letter dated May 24, 1974, is hereby incorporated in the record as ALJ Exh. 1.

Carrier filed a brief with the Deputy Commissioner entitled "Brief of Employer and Insurance Carrier", received December 27, 1973. Thereafter, Employer and Insurance Carrier filed with this Office a Motion to Dismiss and/or for Summary Judgment for Lack of Jurisdiction, hereby incorporated in the record as ALJ Exh. 4. Pursuant to the briefing schedule set forth in ALJ Exh. 3, the Director timely filed a brief entitled "Memorandum of the Director, Office of Workmen's Compensation Programs, in opposition to Employer's and Insurance Carrier's Motion to Dismiss and/or For Summary Judgment". Counsel for Claimant, by letter dated June 13, 1974, addressed to the undersigned, (hereby incorporated in the record as ALJ Exh. 5), advised that Claimant did not wish to file any additional briefs; however, counsel for Claimant by letter dated July 11, 1974, addressed to the undersigned (hereby incorporated in the record as ALJ Exh. 6) set forth the amount claimed as an attorney's fee and medical expenses supported by his signed statement of time and work (hereby incorporated in the record as ALJ Exh. 6-A). Employer and Carrier timely submitted a Reply Brief, dated July 5, 1974. Employer and Carrier by letter dated July 30, 1974, responded to Claimant's counsel's letter of July 11, 1974 (hereby incorporated in the record as ALJ Exh. 7) with regard to attorney's fee and medical expenses. By letter dated February 3, 1975, counsel for Employer-Carrier submitted a copy of a brief filed in BRB No. 74-191-191A, *Diverson Ford v. P. C. Pfeiffer Company, Inc., et al.*, which is hereby rejected as not timely filed.

On the basis of the stipulations of the parties and the briefs and memoranda filed herein, I make the following findings, conclusions and order.

Findings of Fact

The facts are fully set forth in the Stipulations of the parties and the pertinent facts are summarized as follows:

1. Employer, Ayers Steamship Co., is a ship agency and a terminal operator and does not employ longshoremen to load or unload vessels (Stip. 1, pp. 3, 4). As a ship agency, Employer has employees who board ocean-going vessels and perform some duties on the navigable waters of the United States (Stip. 1, p. 4). As a terminal operator, Employer receives cargo for eventual loading aboard a vessel and stores it in a pierside warehouse until space aboard a vessel is ready to receive it and until longshore labor is available to load the cargo (Stip. 1, p. 4).

2. To perform its terminal operations in Galveston, Employer employs cotton headers and quaymen from Local 1308 (Stip. 1, p. 4). Local 1308 is the ILA cotton headers local (Stip. 3, p. 3). Cotton headers are employed solely to unload cotton bales from shoreside transportation and to store it in pierside warehouses. Cotton headers never move the bales from the pile (warehouse) to the ship (Stip. 1, p. 2). Quaymen perform cargo shifting operations from one storage location to another storage location within the pierside warehouses, but they do not perform longshore work. Cotton headers and quaymen do not deliver cargo to vessels and never work on vessels or on the navigable waters of the United States (Stip. 1, pp. 4-5).

3. Claimant, for five or six years prior to May 2, 1973, had worked exclusively as a cotton header or

quayman out of Local 1308; Claimant has done no longshoring work; and Claimant's work has on no occasion required him to go aboard a vessel on the navigable waters of the United States (Stip. 1, pp. 1, 3)

4. On May 2, 1973, Claimant, while employed by Employer as a cotton header at a warehouse immediately adjacent to Pier 23, Port of Galveston, Texas, sustained a fracture of the 5th Metacarpal bone in his right hand and other injuries to his right hand when, as he was unloading a bale of cotton, a "spider" from the banding on the bale caught his glove and pulled him along with the rolling bale so that his right hand was caught between two bales (Stip. 1, pp. 1, 2).

5. The driver of the dray wagon, an employee of Bluebonnet Warehouse, who had brought the dray wagon to the warehouse, was assisting Claimant unload the bales when Claimant was injured (Stip. 1, p. 2).

6. In the Port of Galveston, cotton is received by various shoreside cotton compress/warehouses from inland shippers. The cotton is then drayed to pier warehouses, the driver of the dray, together with two cotton headers take the cotton off the dray wagon and move it to the designated place in the pier warehouse (Stip. 1, p. 1). The cotton remains stored in the warehouse until it is moved by longshoremen, not cotton headers, to shipsid. After the cotton headers take the cotton off the dray wagons and put it to rest in the warehouse, they do not load it again (Stip. 1, p. 2), unless the cotton is removed from that warehouse and stored in another warehouse (Stip. 1, p. 4), in which event, although cotton headers do not move cotton from one warehouse to another, they may be employed, as cotton

headers, to receive cotton into the other warehouse from dray wagons which have come from another pierside warehouse. Cotton headers do not work at any location other than pierside warehouses (Stip. 3, pp. 4-5).

7. The cotton on which Claimant was working when injured was stored in anticipation of the arrival of the SS KOREAN EXPORTER which was not in port at the time and did not arrive at the dock until May 7, 1973. The cotton which Claimant was actually heading at the time of his injury on May 2, 1973, was, in fact, loaded aboard the KOREAN EXPORTER by longshoremen on May 7, 1973. The loading of the KOREAN EXPORTER was accomplished by longshoremen employed by Young & Company, an independent contracting stevedoring company in no way affiliated with Employer. Young & Company was employed by the vessel's operator (Stip 1, pp. 3-4).

8. The Deepsea and Cotton Agreement Rule 20, which defines longshore work, provides, in part, as follows:

"Longshore work shall constitute the loading and discharging of all sea-going vessels . . . and all labor connected with the loading and discharging of ships . . . Longshore labor also includes all men who truck cargo direct to and from pile or car or to and from the ship's side to hatches. The important distinction being whether or not the freight is handled once, that is to say, laid down or piled. It is mutually agreed that when assorting is necessary when discharging the employment of warehouse labor is optional.

..." (Stip. 3, pp. 3-4)

9. The Cotton Headers Union Contract provides:

"It is recognized and agreed that breaking down cotton stacked for loading aboard ship is longshore work." (Stip. 1, p. 2).

10. It is possible that cotton can be transferred directly from dray wagon to ship, in which event the work would be done by longshoremen; however, if this is done, cotton headers who otherwise would have stored the cotton in the warehouse must be paid for each bale so handled by the longshoremen (Stip. 3, p. 2).

11. Cotton stored in the warehouse by cotton headers is segregated by lot (Stip. 3, p. 2); may remain in storage for periods ranging from less than a day to several weeks; each warehouse allows a certain number of days of "free time" after which storage charges accrue. At the warehouse in which Claimant's injury occurred, "free time" for cotton was 15 days (Stip. 3, p. 3).

12. Claimant's average weekly wage was \$166.69. Following the injury in question, Claimant was temporarily totally disabled from May 4, 1973, to June 29, 1973, a period of eight weeks, for which compensation under the Act would be \$889.04; that, in addition, Claimant has suffered a permanent partial disability to his right hand from June 30, 1973, for which he would be due compensation under the Act for a further period of 24.4 weeks in the total sum of \$2,711.57; and that the total amount of compensation owed if jurisdiction is determined to exist under the Act is \$3,600.61 (Stip. 2, p. 2), not including, however, \$158.00 of medical expenses claimed by Claimant's attorney (ALJ Exh. 6-A) to which Employer-Carrier have noted an objection (ALJ Exh. 7).

13. Carrier has paid Claimant compensation for temporary total disability for eight weeks at the maximum weekly rate under the Workmen's Compensation Act of Texas; that if jurisdiction is found to exist under the Act, Employer-Carrier are entitled to a credit of the amount of State compensation paid; that whatever additional compensation, if any, Claimant may be entitled under the State compensation act if jurisdiction is found not to exist under the Act will be determined after final decision in this case (Stip. 2, p. 2).

14. Timely notice of injury was given; claim for compensation under the Act was timely filed; and Employer-Carrier have furnished such medical care and attention as the nature of injury required (Stip. 2, p. 1).

Conclusions

Claimant performed no work on navigable waters and was injured in a warehouse on the land. Clearly, prior to the 1972 amendments of the Act he would not have been covered by the Act. *Nacirema Operating Co., Inc. v. Johnson*, 396 U.S. 212 (1969).

Employer has employees who are employed in maritime employment upon the navigable waters of the United States and is, therefore, an "employer" within the meaning of Section 2(4) of the Act; but a claim is no longer covered by the Act merely because the employer has other employees employed in maritime employment and the injury occurred upon "navigable waters". Coverage under the Act now requires that the employee, himself, be a person engaged in maritime employment, as very succinctly and very correctly stated by the Solicitor in his brief as follows:

"An injured claimant now must meet that definition, [of employee § 2(3)] or his injury will not fall within the terms of § 3(a); he may no longer rely on the fact that *other* persons working for his employer are doing maritime work.

"In the absence of this new 'status' requirement, the Act would have reached injuries on land to persons whose employment involved no maritime function; such injuries, however, are not maritime subjects at all. The purpose of the limitation of coverage to persons 'engaged in maritime employment' was thus to restrict the Act's application to subjects within the Federal admiralty powers." (Memorandum of Director, p. 4).³

Claimant was not a longshoreman; he did not load vessels. He was a cotton header, or warehouseman; his

3. Liability prior to the amendment of Section 2(3) of the Act, in cases such as *Peter v. Arrien*, 325 F. Supp. 1361 (E.D. Pa.), *aff'd*, 463 F.2d 252 (3rd Cir. 1972), was predicated on the definition of "employer" in § 2(4) as ". . . an employer any of whose employees are employed in maritime employment . . . upon the navigable waters . . .", the absence of any definition of "employee"—except certain persons not included "in the term, and the provision of § 3(a) which provided,

"Compensation shall be payable . . . in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States . . ."

Coverage was established if the disability or death occurred on navigable waters even if the decedent or disablee was not engaged in maritime employment, if the employer had some employees employed in maritime employment. *Gilmore v. Weyerhaeuser Company*, BRB No. 74-141. However, Section 2(3) of the Act, as amended, now defines the term "employee" as,

". . . any person engaged in maritime employment . . ."

Consequently, this term "employee" in § 3(a) of the Act now means a person engaged in maritime employment, i.e., even if disability or death occurs on navigable waters, such disability or death would be covered under § 3(a) only if that employee were engaged in maritime employment.

duties as a cotton header consisted solely of unloading bales of cotton from dray wagons and storing the bales of cotton in segregated lots in the warehouse or, possibly, on rare occasions moving bales of cotton from one location to another within the same warehouse. On other occasions, Claimant worked as a quayman in moving cotton bales from one warehouse to another warehouse. Claimant was injured at a warehouse "immediately adjacent",⁴ but not adjoining, Pier 23, Port of Galveston, Texas.

The warehouses at which cotton headers work are also described as "pierside" and the cotton bales are brought to such pierside warehouses with the express intention that the cotton will be shipped in maritime commerce aboard sea-going vessels. Nevertheless, Claimant's duty as a cotton header was to store the cotton bales in the warehouse. The cotton bales come to rest in the warehouse. The movement from the warehouse, or "pile" to dockside is performed by longshoremen. The Union agreements draw a hard, but clear, line of demarcation between warehouse, or cotton header, work on the one hand and longshore work on the other. Longshore work begins at the warehouse, or "pile" to dockside and loading aboard a vessel; warehouse, or cotton header, work

4. The dictionary definition of "adjacent" is "Lying near, close, or contiguous; neighboring; bordering on; as a field adjacent to the highway." Webster's New International Dictionary, 2nd Ed. (1958)

or

"Lying near or close to; sometimes, contiguous; neighboring . . . Adjacent implies that the two objects are not widely separated, though they may not actually touch . . . while adjoining imparts that they are so joined or united to each other that no third object intervenes." Black's Law Dictionary, Revised 4th Ed. (1968)

extends to the storage of the cotton bales in the warehouse, or "pile", shifting of cotton bales within a warehouse. Rule 20 of the Deepsea and Cotton Agreement, which defines longshore work, expresses it as follows:

" . . . Longshore labor also includes all men who truck cargo direct to and from pile . . . The important distinction being whether or not the freight is handled once, that is to say, laid down or piled . . . "

The Cotton Headers Union Contract provides that,

" . . . breaking down cotton stacked for loading aboard ship is longshore work."

Under the Galveston Union contract, cotton bales must be handled twice, that is, must be laid down or piled before moving to the ship's side or cotton headers, who otherwise would have laid down, or piled, the cotton must be paid for each bale so handled by the longshoreman.

Section 2(3) of the Act, as amended, defines employee as follows:

"The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . . "

Section 3(a) of the Act, as amended, specifies the coverage of the Act as follows:

"Compensation shall be payable under this Act in respect of disability or death of an employee, but

only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). . . ."

Claimant was not a longshoreman and he was not engaged in longshoring operations; he was not injured upon the navigable waters nor on any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel. Was he, nevertheless, as contended by the Solicitor, engaged in maritime employment?

Neither S. 2318 [July 20 (legislative day, July 19, 1971)] nor S. 525, [February 2, (legislative day, January 26, 1971)] on which the Hearings were held [Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Hearing before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 92nd Cong., 2nd Sess. (1972)] proposed any change in coverage or amendment of Sections 2(3) or 3(a) of the Act so that scant attention was given in the Hearing to any question of coverage or jurisdiction. The following comments relating to the matter have been noted:

"Senator Javits. . . .

"Lastly, Mr. Secretary, I understand that there is also some controversy about work over land and work over water, and there has been quite a good deal of litigation. Would you have any suggestion as to how we could deal with that subject?

"Secretary Hodgson. I had thought that through years of court cases on this that that thing had been somewhat narrowed, that question under that had been somewhat narrowed.

"I don't know how we could improve that differentiation, but I would be willing to examine whether or not we could.

"I would like to see if Mr. Schubert has any comments on that.

"Mr. Schubert. Well, the latest case to draw a line was the Nacirema case, and it drew the line between the ship and the plank and the land on which the dock was located. It seems to me that it is inevitable that a line be drawn somewhere. It is just a matter of judgment as to the most appropriate geographical place.

"I think that we certainly could work with staff in coming up with a more rational and reasonable line. I am always apprehensive that we open the door to more litigation, but we certainly would be delighted to look at it, as we have been in the preparation for these hearings.

"Senator Javits. Thank you very much. I think that the willingness of the Department to examine these questions with an open mind is very gratifying, and I am hopeful that we can have a collaboration that will be constructive." (Hearings, pp. 38-39)

"Mr. Mittelman. One other question, and that concerns the reach of a Longshore Act as proposed, its relationship to the State act. Concerning the water's edge, how does that apply to a ship repair yard? I think I understand pretty well how it applies to customary longshore situations. I am not quite clear how a shipyard is set up.

"Mr. Hartman. Same thing.

"Mr. Mittelman. Is most of the work actually performed over navigable waters, or is a lot of it performed on dry land?

"Mr. Hartman. In an average ship repair yard, I don't know, I guess it would be 60 or 65 percent, depending on whether it is a conversion, or if it is a repair of a damage at sea, but, on the average, I would say 65 or 70 percent of the work in a standard repair yard is performed aboard the vessel, afloat in navigable waters or in drydock.

"Mr. Mittelman. Would you see any virtue, or it is in fact feasible to have the same rule apply as far as compensation goes? In other words, to extend the Longshore Act to all ship repair work performed over the water or contiguous to it, in proximity to it, so that you do not get this duality of benefits, I mean, particularly as we amend this law as you propose, it is going to be much better than of the State laws, so there will be quite a difference in benefits, depending on which side of that water's edge the ship repairman in your case is entered.

"Mr. Hartman. I am not authorized to speak for the shipbuilding industry. I can respond personally to that question, and for my own company, and tell you that we would see no objection, we would interpose no objection, to extending the Longshoremen's Act to the landbased facility of the ship repair yard.

"Mr. Mittelman. That is very helpful to know that. Thank you." (Hearings, pp. 76-177)

Mr. Davis B. Kaplan, Chairman of Admiralty Section, American Trial Lawyers Association, excerpt from prepared statement, entitled "An Analysis of Senate Bill 525."

"The maritime worker, whether he be crew-member or longshoreman, is obligated to perform his employment on a ship which he has no familiarity with, nor control over and with equipment generally supplied by the ship . . . (Hearings, p. 363)

* * * * *

"It is also of some importance, it seems to us, that most shoreside workers can and do exercise some control over the area in which and the tools with which they work. This is not true of longshoremen. They must work, if they are to work at all, in and on areas supplied by a total stranger over whom they exercise no control. They must accept the area and tools of work as they find them or refuse to work. Because of the hazardous nature of the work, the rights and obligations of the people involved have been molded by the legislature and by our courts in order to harmonize the divergent interests. On the one hand the marine worker must perform his work under severe circumstances so the correlative duty of the shipowner is to provide a reasonably safe place for the worker to perform his activity." (Hearings, p. 368).

In an amendment reported by Senator Eagleton on September 13, 1972, the original provisions of S.2318 were stricken and extensively revised provisions were substituted. S.2318, as amended was accompanied by S. Rep. 92-1125, 92nd Cong., 2nd Sess. (Sept. 14, 1973). See, Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, prepared by the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 92nd Cong., 2nd Sess., December, 1972 (References to the Legislative History, "Leg. History" will be identified as to source followed by the page of the

Legislative History volume and, where applicable, the page of the Report).

S. Rep. 92-1125 with respect to the extension of coverage stated, in part, as follows:

"The bill also expands the coverage of this Act to cover injuries occurring in the contiguous dock area related to longshore and ship repair work." (Rep. p. 2, Leg. History p. 64).

* * * * *

"Extension of Coverage to Shoreside Areas

"The present Act, insofar as longshoremen and shipbuilders and repairmen are concerned, covers only injuries which occur 'upon the navigable waters of the United States.' Thus coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs." (Rep. p. 12, Leg. Hist. p. 74)

* * * * *

"It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

"The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

"The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, the employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise

the Committee has no intention of extending the coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged in whole or in part, in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters."

(Rep. p. 13, Leg. Hist. p. 75)

H. R. 12006, initially introduced by Congressman Daniels on December 2, 1971, was amended September 25, 1972, by striking out all of the original proposals and substituting provisions identical to those contained in S. 2318, as amended, and H. R. 12006, as amended, was accompanied by H. R. Rep. 92-1441 which, as pertains to the extension of coverage, is substantially identical to S. Rep. 92-1125 (See, for example, Rep. pp. 10-11, Leg. Hist. pp. 216-217).

"We do not believe that the compensation payable to a longshoreman or harbor worker should depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, section 2 of our bill amends the act to provide coverage of longshoremen, harbor workers, ship repairmen, shipbuilders, shipbreakers, and other employees engaged in maritime employment—excluding masters and members of the crew of a vessel—if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, drydock, terminal, buildingway, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading; unloading; repairing; or building a vessel." (Statement, Cong. Daniels, Leg. Hist. p. 287)

QUESTIONS AND ANSWERS

"Question. The present law covers employees working on navigable waters. Do the amendments change the scope of coverage?

"Answer. Yes. The present law's coverage is limited to employees working on navigable waters, including those working on dry docks. The amendments will extend coverage to wharfs, terminals, marine railways and other adjoining areas customarily used in building, repairing, loading, or unloading vessels. Also, the definition of "employee" is clarified by the amendments.

"The latter change was made so that a determination of coverage can be made on the basis of the definition of "employee." Under the present law that definition is so vague that the determination must be made on the basis of whether the injured individual was working for a covered "employer." The expansion of coverage is intended to bring about a measure of compensation uniformity applicable to persons customarily considered to be working in the business. Thus, even if an employee does not happen to be over navigable waters at the time he is injured, he will be covered as long as he is working as a longshoreman or harborworker, whether engaged in repairing a vessel or unloading it." (Submitted during floor debate by Cong. Steiger, Leg. Hist. p. 298).

[From the Congressional Record—Senate, Oct. 18, 1972]

LONGSHORMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972
Mr. Eagleton. . . .

"Significant improvements in the act are also made in the area of extended coverage, by extending

coverage to injuries occurring in the contiguous dock area related to longshore and ship repair work. . . ." (Leg. Hist. p. 383).

Reasonable minds may differ as to intent of Congress as evidenced by the Legislative History provided for, like the Bible, it can be read to support quite divergent views. Bearing in mind the admonition of a former professor that "the Bible has suffered from inattention to what is said and the manner in which it is expressed", which admonition is equally applicable to conclusions as to presumed Congressional intent, it must be noted: a) in the course of the Senate Hearings, Senator Javits raised the question of work over land and work over water to which Secretary of Labor Hodgson and Solicitor of Labor Schubert responded. Mr. Schubert stated that the latest case to draw the jurisdictional line was the *Nacirema* case. He further stated, "It seems to me that it is inevitable that a line be drawn somewhere. It is just a matter of judgment as to the most appropriate geographic place. . . ."; b) minority counsel Mittelman raised the question of extension of the Act to all ship repair work, to which Mr. Ralph Hartman responded that his own company ". . . would interpose no objection to extending the Longshoremen's Act to the land-based facility of the ship repair yard. . . ."; c) "maritime worker" was discussed as "crewmember or longshoreman" and special significance was placed on fact that ". . . most shoreside workers can and do exercise some control over the area in which and the tools with which they work. This is not true of longshoremen. . . ."; d) Senate Report 92-1125 states at the outset that "The bill also expands coverage of this Act to cover injuries occurring in the contiguous dock area *related to longshore and ship repair*

work." (Emphasis supplied); and Senator Eagleton, who reported the amendment to S. 2318, repeated the same statement in his statement on October 18, 1972; f) Senate Report 92-1125 and House Report 92-1441, make it clear that the primary concern, vis-a-vis loading and unloading, was that the longshoremen be covered whether the work be over water or on the land and stated, "The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by the Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. *The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area.* The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity." (Emphasis supplied); and g) Congressman Steiger, in his Questions and Answers, stated, "The expansion of coverage is intended to bring about a measure of compensation uniformity applicable to persons customarily considered to be working in the business. *Thus, even if an employee does not happen to be over navigable waters at the time he is injured, he will be covered as long as he is working as a longshoreman or harbor worker, whether engaged in repairing a vessel or unloading it.*" (Emphasis supplied)

Coverage under the Act has never been, and is not now, governed by engagement in maritime commerce.

From the foregoing, I conclude that Congress extended coverage only to the point on such pier, wharf, or terminal adjoining navigable waters, that the longshoring operation, i.e., the loading of a vessel, begins and that the extension of coverage ceases when the longshoring operation ceases when placement of the cargo on such pier, wharf, or terminal adjoining navigable waters. No other conclusion is consistent with the language of § 2 (3) of the Act "longshoreman or other person engaged in longshoring operations" and the expressed Congressional intent that the extended coverage apply to, "The employees who perform this [longshoring] work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area" *but specifically would not cover* "employees who are not engaged in loading, unloading, or repairing a vessel, just because they are injured in an area adjoining navigable waters used for such activity."

Claimant was not a longshoreman; he did not perform longshoring operations; and the bales came to rest in the pile, or warehouse, before the longshoring operation began. That cotton headers are not persons customarily considered to be working in the longshoring business is firmly established, not only by custom and practice in the industry in the Port of Galveston, but also by the agreement of the Cotton Header Union, under which Claimant worked, as well as by Rule 20 of the Deepsea and Cotton Agreement. It is true, of course, that placement of the cotton bales in the pile was the last step before commencement of the loading, or longshoring operation; that the cotton was brought to pierside warehouses in expectation that it would be loaded aboard sea-going vessels; and, indeed, that longshoremen take

the bales, stored by cotton headers, from the pile to dockside and load the bales in the vessels. Nevertheless, Claimant's work does not involve loading a vessel and is not a longshoring operation and, as pertains to this case, Claimant is not, therefore, engaged in maritime employment within the meaning of Section 2(3) of the Act.⁵ Stated otherwise, the movement of cargo does not become a maritime employment within the contemplation of Section 2(3) of the Act until the longshoring operation begins. In this case, Claimant's work ceased and the cargo came to rest in the warehouse before the longshoring operation began. Accordingly, Claimant is not subject to the coverage of the Act.

This conclusion is consistent with the decisions of the Benefits Review Board construing the Act, or at least, is not irreconcilable with the decisions of the Benefits Review Board construing the Act. *William T. Adkins v. I.T.O. Corporation of Baltimore*, BRB NO. 74-123 (1974), involved an injury while loading stripped cargo into trucks for further movement. Although the Board affirmed the finding of the administrative law judge that the injury occurred while the cargo was still in maritime commerce, which, with all deference, is not a proper criteria of coverage within the meaning of the Act; nevertheless, the Board held that, "The Claimant was performing the first and last in a series of longshoring operations thereby bringing him within the scope of

5. Obviously, the extension of coverage brings within the protection of the Act persons engaged in maritime employment who are harbor workers, even though they are not longshoremen, nor ship repairmen, nor shipbuilders, nor shipbreakers. For example, a line tender, whose duties consist of the docking and undocking sea-going vessels, is engaged in maritime employment even if his duties are performed on the dock.

maritime employment." Here, the longshoring operation began after Claimant stored the cotton in the warehouse.

Dominick Coppolino v. International Terminal Operating Company, Inc., BRB No. 74-136 (1974), involved a foreman of longshoring and hiring agent who was injured while replacing paper in an IBM machine located in a building on the pier. The Board held that, "The fact that at the time of injury he was engaged in a clerical function necessary to the performance of his job does not remove him from the sphere of longshoring operation, nor from coverage under the Act." *Herbert L. Perdue v. Jacksonville Shipyards, Inc.*, BRB No. 74-200 (1975), involved injury to a shipfitter which occurred when he disembarked from a company bus in order to "punch out". The point of injury was about one mile by land from the ship on which he was working but still within the naval station. The Board held that the "claimant is entitled to coverage under the Act." Both in *Coppolino* and *Perdue* the Board was confronted with injuries to persons clearly covered by the Act in their regular employment, where the injury occurred in the course of employment but at a time when they were not engaged in their regular covered employment. Here, of course, Claimant was not a longshoreman and was not engaged in a longshoring operation so that the "course of employment" rationale is not applicable.

Giacomo Avvento v. Hellenic Lines, Ltd., BRB. No. 74-153 (1974), involved an injury while loading cargo onto a truck parked on the pier. The Board held, "This was a final step in the unloading process. . ." As noted above, the loading, or longshoring, operation in this case began after the completion of Claimant's work.

Donald D. Brown v. Maritime Terminals, Inc., 74-177 and 74-177A (1974), involved an injury while "stuffing" cargo into a shipping container in a warehouse. The Board held that, ". . . the claimant was injured while within the scope of coverages as enlarged by the 1972 amendments to the Act. . ." There, in accordance with union jurisdictional claims and industry practice, the longshoring operation began with the stuffing of containers. Here, of course, in accordance with union agreements, jurisdictional claims and industry practice the longshoring operation began with removal of the cotton bales from the pile, i.e., Claimant's work ceased before the longshoring operation began.

In view of the language carefully chosen by Congress, Claimant was not injured on an adjoining pier, wharf or terminal, but see, *William T. Adkins v. I.T.O. Corporation of Baltimore*, *supra*; however, even if he were, Congress stated that the Act was not intended to cover "employees who are not engaged in loading, unloading, or repairing a vessel, just because they are injured in an area adjoining navigable waters used for such activity." Claimant was not, in any event, engaged in loading, unloading, or repairing a vessel.

Finally, the Solicitor states that

". . . employees who only deliver cargo to . . .⁶ 'storage' facilities—like the driver of the cotton dray, an employee not of Ayers but of Bluebonnet Warehouse, who assisted Bryant [Claimant] and another cotton header in unloading the cotton from the dray wagons . . . are not covered by the Act." (Memorandum of Director, p. 7).

6. The phrase, "on-pier" is clearly in error and has been omitted.

Claimant, as well as the driver of the cotton dray, merely delivered cargo to storage facilities. Although this brought the cargo to a "pierside" point, Claimant's work was a warehousing function and the longshoring operation began after completion of the warehousing operation. Indeed, until the longshoring operation began the cotton was subject to movement to other warehouses. The line of demarcation between warehousing on the one hand and longshoring on the other was clearly and emphatically set forth in the Union agreements. The example given in Senate Report 92-1125 and in House Report 92-1441 that the extension of coverage goes to the point that the cargo comes to rest on the pier, wharf or terminal adjoining navigable waters necessarily means that the extension of coverage in unloading cargo ends at that point and conversely, the extension of coverage in loading begins when the longshoring operation begins. As noted above, it is fully recognized that the Benefits Review Board, consistent with industry practice, has held that the Act extends to "stuffing" or "unstuffing" of containers because that is the point that the longshoring operation begins or ends. But here, the industry practice and the applicable union contracts quite specifically provide that the longshoring operation begins with the removal of the cotton bales from the pile, or warehouse, and the longshoring operation ends with the placement of the cotton bales in the pile, or warehouse. Claimant was not engaged in loading a vessel and, hence, was not engaged in maritime employment at the time of injury. *Kenneth E. Powell v. Cargill, Inc.*, 74-LHCA-172 (1974); *John A. Richardson v. Great Lake Storage & Contracting Co.*, 74-LHCA-223 (1974). The presumption of Section 20 is self limiting, i.e., "in the absence

of substantial evidence to the contrary"; has no quality of affirmative evidence, *John W. McGrath Corporation v. Hughes*, 264 F.2d 314, 317 (2nd Cir. 1959); "Its only office is to control the result where there is an entire lack of competent evidence." *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935); and as to jurisdiction does not become effective until jurisdiction is first affirmatively established and only then does the coverage presumption become effective. *Atlantic Stevedoring Company, Inc. v. O'Keefe*, 220 F.Supp. 881 (S.D. Ga. 1963) *rev'd on other grounds*, 354 F.2d 48 (5th Cir. 1965); *Employers Mutual Liability Insurance Company of Wisconsin v. Arrien*, 244 F.Supp. 110 (N.D. N.Y. 1965) Employer-Carrier have come forward with substantial stipulated evidence and even a liberal construction may not be employed to frustrate the Congressional intent as evidenced by the new definition of "employee", the Committee Reports and the related legislative history. *Diverson Ford v. P. C. Pfeiffer Company*, 74-LHCA-181 (1974).

The exclusion of the driver of the dray wagon from coverage, as conceded by the Solicitor, in the event of injury while working with the cotton headers in unloading bales from the dray wagons and storing the bales in the warehouse would perpetuate the disparity in benefits payable to employees performing the same job; but, if Claimant were otherwise covered by the Act, the non-coverage of a fellow employee could not deprive an employee otherwise covered of the benefits of the Act. Cf., driver of truck in *Giacomo Avvento v. Hellenic Lines, Ltd.*, BRB No. 74-153 (1974).

For the foregoing reasons, Claimant was not an employee within the meaning of Section 2(3) of the Act

and compensation for his injury is not within the coverage of Section 3(a) of the Act. Accordingly, Employer and Carrier's Motion to Dismiss for lack of jurisdiction will be granted and Claimant's claim will be denied as not within the coverage of the Act. In view of the denial of the claim for compensation, the further claim of Claimant's attorney for the allowance of an attorney's fee, medical expenses and costs must also be denied. *Director Office of Workmen's Compensation Programs v. Hemingway Transport, Inc.*, BRB No. 74-129 (1974); *John Karacostas, Sr. v. Port Stevedoring Company, Inc.*, BRB No. 74-176 (1974); *Leo F. Baum v. Jacksonville Shipyards, Inc.*, 74-LHCA-88, aff'd BRB No. 74-110 (1974).

ORDER

The Claim of Claimant, Will Bryant, be, and the same is hereby, dismissed for lack of jurisdiction.

The claim of Claimant's attorney for allowance of an attorney's fee, medical expenses and costs be, and the same are hereby, dismissed for lack of jurisdiction.

/s/ WILLIAM B. DEVANEY
 William B. Devaney
 Administrative Law Judge

Dated: February 28, 1975
 Washington, D.C.

(Jurat Omitted in Printing)

U. S. DEPARTMENT OF LABOR
 Benefits Review Board
 Washington, D.C. 20210

(SEAL)

BRB Nos. 75-137 and 75-137A

WILL BRYANT, Claimant-Petitioner

v.

**AYERS STEAMSHIP COMPANY and
 TEXAS EMPLOYERS' INSURANCE ASSOCIATION,**
 Employer/Carrier-Respondents

**DIRECTOR, OFFICE OF WORKERS'
 COMPENSATION PROGRAMS,
 UNITED STATES DEPARTMENT OF LABOR,
 Petitioner**

Appeal from Decision and Order of William B. Devaney, Administrative Law Judge, United States Department of Labor.

Arthur L. Schechter (Downman, Jones & Schechter) Houston, Texas, for the claimant.

E. D. Vickery, W. Robins Brice (Royston, Rayzor, Cook & Vickery), Houston, Texas, for the employer/carrier.

Joshua T. Gillelan, II (William J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

DECISION

Miller, Member:

These appeals by the claimant and by the Director, Office of Workers' Compensation Programs (hereafter, the Director), are from a Decision and Order (74-LHCA-89) of Administrative Law Judge William B. DeVaney, in which he found lack of jurisdiction over this claim for compensation, filed pursuant to provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq. (hereafter referred to as the Act).

All pertinent facts, including degree of disability and amount of compensation due if the claimant were found to be subject to the Act, were stipulated by the parties. All parties waived formal hearing and oral argument and agreed that the case be submitted for decision on the agreed stipulations of fact. The administrative law judge found the sole issue for determination to be "jurisdiction", specifically, whether or not a cotton header, injured while unloading cotton bales from a dray inside a pier-side warehouse, is subject to the provisions of the Act. The administrative law judge determined that the "claimant was not an 'employee' within the meaning of Section 2(3) of the Act and compensation for his injury is not within the coverage of Section 3(a) of the Act". 33 U.S.C. §§ 902(3), 903(a). Therefore, he dismissed the claim for lack of jurisdiction. From this denial of compensation, both the claimant and the Director appeal.

The employer is a ship agency and terminal operator. As a terminal operator, it receives cargo for temporary

storage in a pier-side warehouse. Cotton bales are held in such a warehouse for periods averaging one week, then moved out and placed on board a vessel. The company does not provide stevedoring services to ships, but rather contracts with other companies to move cargo to or from the warehouse and ships.

The claimant was employed as a cotton header. His duties were to assist another cotton header and the driver of the dray in unloading bales of cotton from the dray and placing them in a warehouse located immediately adjacent to Pier 23 at Galveston, Texas. The claimant's duties never required him to assist in moving cargo from a warehouse to a ship or to work on board a vessel, but on occasion he did participate in movement of cargo from one warehouse to another. On May 2, 1973, the claimant injured his right hand while unloading bales of cotton from a dray.

The jurisdictional requirements of the Act are embodied in Sections 2(3), 2(4) and 3(a). 33 U.S.C. §§ 902(3), 902(4) and 903(a). There is no dispute that the employer is an "employer" as defined in Section 2(4). The parties stipulated that the claimant's accident occurred in a warehouse immediately adjacent to a pier which adjoins navigable waters. This is an apparent concession that the injury was sustained in a geographic area within the "situs" jurisdiction of Section 3(a). However, in his Decision and Order, the administrative law judge found that the injury in this case did not come within Section 3(a) coverage.

Although the parties apparently stipulated that the claimant sustained his injury within the geographic reach of the Act, such a stipulation is not binding on the

fact-finder. *California Ship Service Co. v. Pillsbury*, 175 F.2d 873 (9th Cir. 1949). While the parties did not address Section 3(a) in their written submissions to the administrative law judge, he nevertheless rejected the apparent concession that the "situs" requirement of jurisdiction was met and found that this claim is not within the coverage of Section 3(a) of the Act. This conclusion is erroneous.

There is little evidence in the record of the geographic relationship between the site of the warehouse where the claimant was injured and navigable waters. Nevertheless, it is clear from the record that the employer is a terminal operator; that the claimant's accident occurred in a warehouse immediately adjacent to Pier 23; that the pier adjoins navigable waters of the United States; that this pier-side warehouse is used for the temporary storage of cotton prior to loading a ship; and that usually cotton is taken directly from that warehouse to a ship and loaded aboard. Given these facts, stipulated by the parties, and found by the administrative law judge, his conclusion that the claimant was "not injured upon the navigable waters nor on any adjoining pier, wharf, dry dock, *terminal*, building way, marine railway, or *other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*" (emphasis added) is clearly erroneous as a matter of law. The clear language of Section 3(a) includes the pierside warehouse where this claimant was injured.

The issue most strenuously pursued before the administrative law judge and again here on appeal, concerns whether or not the claimant is an "employee" as defined in Section 2(3). The administrative law judge deter-

mined that the claimant was not engaged in maritime employment, that he was not engaged in longshoring operations, and so was not a Section 2(3) employee. This conclusion is erroneous as a matter of law.

Section 2(3) does not require that a claimant be engaged in moving cargo to a ship for immediate placement aboard, or in removing cargo from a ship, in order to qualify as an "employee"; he need only be engaged in longshoring operations, which include all essential steps in the overall process of loading cargo; his duties need only constitute an integral part of the continuous longshoring operation to support a conclusion that he was engaged in maritime employment. *Scalmato v. Northwest Marine Terminal Co.*, 1 BRBS 461, BRB No. 74-203 (May 7, 1975).

Contrary to the position of the administrative law judge, this Board does not subscribe to a "point of rest" theory, in which cargo is maritime in nature and those who handle it are engaged in maritime employment, only when that cargo is being moved from a dock to a ship. *See Ford v. P.C. Pfeiffer Co., Inc.*, 1 BRBS 367, BRB Nos. 74-191, 191A (Mar. 21, 1975). The legislative history of the Act clearly indicates that all cargo handling operations performed on land within the confines of a terminal are to be covered.

. . . It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman . . . should not depend

on the fortuitous circumstance of whether the injury occurred on land or over water.

H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 10 (1972).

The Board finds that the claimant's job in this case, unloading cotton bales from a truck in a pierside warehouse, was the first step in a longshoring operation which would eventually conclude at some future date with placement of the cotton in the hold of a ship. *See Powell v. Cargill, Inc.*, 1 BRBS 503, BRB Nos. 74-206, 206A (May 30, 1975). The administrative law judge misinterpreted Section 2(3) of the Act in determining that the claimant was not an "employee" as defined in that section.

This case is hereby remanded to the administrative law judge for entry of a compensation order in favor of the claimant, consistent with this opinion.

/s/ JULIUS MILLER
Julius Miller, Member

We Concur:

/s/ RUTH V. WASHINGTON
Ruth V. Washington, Chairperson

/s/ RALPH M. HARTMAN
Ralph M. Hartman, Member

Dated this 13th day
of November, 1975

(Jurat Omitted in Printing)

OCT 13 1978

MICHAEL ADDAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

NO. 78-425

**P. C. PFEIFFER CO., INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,**
Petitioners

v.
**DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,**
Respondents

**AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,**
Petitioners

v.
**WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,**
Respondents

**ANSWER OF RESPONDENT WILL BRYANT TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

ARTHUR L. SCHECHTER
2080 Two Shell Plaza
Houston, Texas 77002
(713) 223-1314
Attorney for Petitioner

Of Counsel:
SCHECHTER & SHELTON, INC.

SUBJECT INDEX

	Page
OPINIONS BELOW	2
REVIEW OF THE FACTS OF THIS CASE	3
REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI	5
I. THERE IS NO CONFLICT BETWEEN THE OPIN- ION BELOW AND DECISIONS OF THIS COURT	5
A. The Situs Test of Caputo is Overwhelmingly Met	5
B. The "Status Test" of Caputo is Met	7
II. THERE IS NO CONFLICT WITH OTHER OPIN- IONS OF THIS COURT	9
III. THERE ARE NO CONFLICTS BETWEEN THE OPINION OF THE FIFTH CIRCUIT AND OTHER COURTS OF APPEAL, AND, IF SO, THE LAW OF THE FIFTH CIRCUIT SHOULD BE ALLOWED TO STAND	10
IV. A LIBERAL AND BROAD INTERPRETATION SHOULD BE GIVEN TO THE ACT AS IT IS REMEDIAL IN NATURE	11
CONCLUSION	12

LIST OF AUTHORITIES

CASES	Page
<i>Alabama Dry Dock & Shipbuilding Co. v. Kininess and the Director, Office of Workmen's Compensation Programs, United States Department of Labor</i> , 554 F.2d 176	8, 12
<i>Conti v. Norfolk & Western Railway Co.</i> , 556 F.2d 890 (4th Cir. 1977)	10
<i>Cargill, Inc. v. Powell</i> , 573 F.2d 561 (9th Cir. 1977) ...	11
<i>Noguiera v. N.Y., N.H. & H.R. Co.</i> , 281 U.S. 128 (1930)	5, 9
<i>Northeast Marine Terminal Co., Inc. v. Caputo</i> , 432 U.S. 249 (1977)	2, 5, 7, 8, 10, 11, 12
<i>Pennsylvania Railroad Co. v. O'Rourke</i> , 344 U.S. 334 (1953)	5, 9, 10
<i>Perdue v. Jacksonville Shipyards, Inc.</i> , 539 F.2d 533 (1976)	2

CASES	Page
<i>Sea-Land Services, Inc. v. Johns</i> , 540 F.2d 629 (3d Cir. 1976)	8
<i>Texport Stevedore Co. v. Winchester</i> , 554 F.2d 245 (1977)	8

UNITED STATES STATUTES

The Longshoremen's and Harbor Workers' Compensation Act:

33 U.S.C. § 901, <i>et seq.</i>	6
33 U.S.C. §§ 902(3), 86 Stat. 1251, Section 2(3)	3, 5, 7
33 U.S.C. §§ 902(4), 86 Stat. 1251, Section 2(4)	3, 7
33 U.S.C. § 903(a), 86 Stat. 1251, Section 3(a)	3, 6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

NO. 78-425

P. C. PFEIFFER CO., INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.
**DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,**
Respondents

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.
**WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,**
Respondents

**ANSWER OF RESPONDENT WILL BRYANT TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Respondent, WILL BRYANT, prays that Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be in all things denied, showing as follows:

OPINIONS BELOW

This case arises under the 1972 Amendments to the Longshoremen's and Harbor Workers' Act.

It had originated in the administrative tribunals established by that Act within the Department of Labor. The administrative law judge found no federal jurisdiction, but was reversed by the Benefits Review Board, 2 BRBS 408, reprinted as Appendix E to the original Petition for Certiorari in Number 76-641, pages 88 to 95.

This decision was affirmed in a single opinion by the Court of Appeals for the Fifth Circuit, reported *sub nom Perdue v. Jacksonville Shipyards, Inc.*, 539 F.2d 533 (1976). This Court vacated the judgments based on that 1976 opinion and remanded these cases to the Court of Appeals for the Fifth Circuit for reconsideration in light of the Court's opinion in *North-east Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977). The Court's Order of Remand is reported at 433 U.S. 904 (1977).

After remand to the Court of Appeals for the Fifth Circuit from the Court, the Court of Appeals reaffirmed its earlier decision based on its prior opinion cited above. The Court's brief opinion reaffirming its prior decision is reported at 575 F.2d 79 (5th Cir. 1978).

STATUTE INVOLVED

The relevant portions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, are as follows:

Section 2(3), 86 Stat. 1251, 33 U.S.C. § 902(3):

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 2(4), 86 Stat. 1251, 33 U.S.C. § 902(4):

The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Section 3(a), 86 Stat. 1251, 1265, 33 U.S.C. § 903(a):

Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel.)

REVIEW OF THE FACTS OF THIS CASE

It has been heretofore stipulated in the record that the following facts were true:

Respondent, WILL BRYANT, sustained a fracture to his hand in the fifth metacarpal bone while working in a warehouse immediately adjacent to Pier 23 in the Port of Galveston, Texas. This pier adjoined the navigable waters of the United States.

In the Port of Galveston, cotton is received by various shoreside compress warehouses from inland shippers of cotton. The cotton is then drayed by trailers to the pier warehouses where it is removed and eventually shipped out on navigable waters.

At the time of this accident, Mr. Bryant, who was working out of International Longshoremen's Association Local 1308, was rolling a bale along a special purpose cotton dray wagon to the edge of the wagon to tip it over and head it off of the wagon in the pierside warehouse.

Though cotton is often taken for loading aboard vessels from the pierside warehouses, as it was on this occasion, it is sometimes directly taken from the shoreside transportation by longshoremen if the vessel on which it is to be shipped is waiting to be loaded. The pier facilities are thus constructed to allow direct transfer from a dray wagon such as that involved in the occurrence in question to shipboard.

At the time and on the occasion in question, WILL BRYANT's employer, AYERS STEAMSHIP CO., INC., operated a steamship agency and a terminal operation. It had employees who necessarily boarded ocean-going vessels and performed portions of their duties on the navigable waters of the United States. In its capacity as a terminal operator, additionally it received cargo for eventual loading aboard vessels and stored it in its pier-

side warehouses until space aboard vessels was ready to receive it or until longshore labor was available to load the cargo. The cotton on which Bryant was working at the time of his accident was loaded on May 7, 1973, onboard the vessel "KOREAN EXPORTER."

**REASONS FOR DENYING THE
PETITION FOR WRIT OF CERTIORARI**

I.

**THERE IS NO CONFLICT BETWEEN THE OPINION
BELOW AND DECISIONS OF THIS COURT**

The holding of the Court below that the injured employee, WILL BRYANT, was engaged in "maritime employment" at the time of his injury is not in conflict with the decision of this Court in either *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977); with the Court's earlier decision in *Pennsylvania Railroad Co. v. O'Rourke*, 344 U.S. 334 (1953); or *Noguera v. N.Y., N.H. & N.R. Co.*, 281 U.S. 128 (1930).

This Court in *Caputo, supra*, adopts two tests for determination as to coverage under Section 2(3) of the Longshoremen's Act as amended in 1972. The first of these concerns the situs of the injury; the second, the status of the employee involved, as to whether or not he was performing work in maritime employment.

A.

The "Situs Test" of Caputo is Overwhelmingly Met

There can be no question that in 1972 Congress amended the Longshoremen's and Harbor Workers' Com-

pension Act, 33 U.S.C. § 901, *et seq.*, extending the Act's coverage to protect additional workers in waterfront areas. The issue in this case is whether or not this extension embraces employees such as Mr. Bryant, who were engaged in maritime employment though not directly participating in work aboard any vessel.

At the time, Mr. Bryant was working at a site undoubtedly covered.

Section 33, U.S.C. § 903(a) states as follows:

Compensation shall be payable in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

The language of this Section was changed in 1972 to cover workers such as Mr. Bryant, who were injured on adjoining piers, etc., and Congress extended the coverage of the Act shoreward.

Accordingly, there can be no question that Congress fully intended to cover areas such as the pierside warehouse in which WILL BRYANT was working at the time he sustained the injury made the basis of his claim. This pierside warehouse was only a few feet from water's edge. Although the cotton in question may have remained in the warehouse several days, as it did on this occasion, the warehouse and pier were set up in such a way that the cotton could be drayed directly onto the pier for immediate loading by a deepwater

longshoreman onto the vessel. Therefore, it seems that there should be little question that Mr. Bryant was working at a covered situs.

B.

The "Status Test" of *Caputo* is Met

The other test of *Caputo* is that of status. Sections 902(3) and 902(4) of the Act make it quite clear that Congress intended to establish coverage for any employee working in "maritime employment" in one of the areas designated. There is no conflict between the opinion of the Court below in the instant case and the opinion of this Court in *Caputo, supra*, with respect to this issue. In *Caputo* the Court recognizes the clear intent of Congress that there be no bifurcation of benefits between workers participating in maritime employment at a covered situs.

Bryant, working out of an International Longshoremen's Association local, performed most of his work in a covered area. On the occasion in question, he was working at a situs covered by the Act. His work was part of the overall loading procedure of vessels either then in port or soon to come into port. Under custom in Galveston, he could have just as easily been instructed to take these bales of cotton directly onto the pier and hand them over to a deepwater longshore loading gang for immediate loading into a ship. His work facilitated the movement of cargo from shore-based compressing companies and storage units to the pierside warehouse. Once he started to achieve his work at a covered situs, work which facilitated maritime movement of cargo, it is urged that he entered a maritime employment covered by the Act.

Bryant's work within the confines of the water's-edge warehouse was just as essential to the seaward movement of the cargo into the holds of oceangoing vessels as was the work of deepwater longshoremen who transported it from the water's edge into the hold of the vessel. The cargo moved into the storage area was undoubtedly destined for shipment aboard oceangoing vessels. The cotton involved herein was, in fact, shipped a few days after the occurrence. The functional relationship of the employee's activity to maritime commerce is the key under *Caputo, supra*. The line Congress intended to draw is not an arbitrary one, but distinguishes between maritime commerce and shore-based commerce. *Sea-Land Services, Inc. v. Johns*, 540 F.2d 629 (3d Cir. 1976).

The Fifth Circuit has similarly espoused this Congressionally intended broad view of coverage. *Alabama Dry Dock & Shipbuilding Co. v. Kinness and the Director, Office of Workmen's Compensation Programs, United States Department of Labor*, 554 F.2d 176; *Texport Stevedore Co. v. Winchester*, 554 F.2d 245 (1977).

Mr. Bryant's connection to the working of cargo was every bit as connected to maritime commerce as Mr. Caputo's. Mr. Bryant was working in an area covered by the Statute, performing labor which resulted ultimately in the more convenient handling of cargo loaded aboard seagoing vessels and, therefore, he was directly involved in the movement of maritime commerce. His work, as strongly as Mr. Caputo's, was performed in the cargo handling operation between the cargo's land transportation and sea transportation. Entry into the cov-

ered area with the cargo by Mr. Bryant was the first part of a two-part loading process of the cargo aboard the vessel. To bifurcate this two-part movement and to allow one laborer to be covered and another, whose work is equally important to the movement of maritime commerce in a covered pierside area, to be left uncovered would result in the sort of bifurcation that both Congress and this Court in *Caputo* found so distasteful in the interpretation of the intent of the Act.

II.

THERE IS NO CONFLICT WITH OTHER OPINIONS OF THIS COURT

A.

Nor is there any conflict between the Court's opinions in *Pennsylvania Railroad Co. v. O'Rourke, supra*, or *Noguiera v. N.Y., N.H. & H.R. Co., supra*. Both cases deal with pre-Amendment definitions of maritime employment and covered situs. In fact, *Noguiera*, in which the Court held that a railroad employee loading freight onto railroad cars on a car float in navigable waters was in maritime employment, it seems to Respondent, is authority that WILL BRYANT's work at the time and on the occasion in question should equally be held to be maritime employment.

In *Noguiera*, the turning point was the situs of the occurrence. Pre-Amendment, if Noguiera had been performing this work beyond the water's edge, undoubtedly he would not have been held to be covered. However, the Court at that time found him so covered because the situs was covered. Therefore, there is no conflict regarding the Court's finding in *Noguiera*.

Neither is *O'Rourke*, *supra*, in any way inconsistent with either the Court's decision in *Caputo* or the decision of the Court below in *Bryant*.

Therefore, for this reason, there is no conflict between *Bryant* and this Court which needs resolution by a Writ of Certiorari.

III.

THERE ARE NO CONFLICTS BETWEEN THE OPINION OF THE FIFTH CIRCUIT AND OTHER COURTS OF APPEAL, AND, IF SO, THE LAW OF THE FIFTH CIRCUIT SHOULD BE ALLOWED TO STAND

A.

The Petitioner seems to place much stock in conflicts between the Fifth Circuit's holding in the instant case and the case of *Conti v. Norfolk & Western Railway Co.*, 566 F.2d 890 (4th Cir. 1977). The facts seem so readily distinguishable as to render *Conti* worthless as far as any relevance to this case. *Conti* is a case that was brought under the Federal Employers' Liability Act in which the Longshoremen's and Harbor Workers' Compensation Act was enlisted as a defense. In *Conti* the laborers involved were so clearly involved with working in railroad employment that the Court held that the Federal Employers' Liability Act was their proper remedy. It is perhaps worthy to note that in that case the employees whose status was questioned were involved in the uncoupling of cars, the releasing of brakes, the rolling of cars, and not with the movement by hand of cargo on a dockside pier or in a warehouse immediately ad-

jacent thereto. In fact, as the Court observes, none of the brakemen ever had occasion to go to Pier 6.

Therefore, in upholding the liberal interpretation to be given to the Federal Employers' Liability Act in its coverage, the Fourth Circuit did nothing in conflict with the Fifth Circuit.

Cargill, Inc. v. Powell, 573 F.2d 561 (9th Cir. 1977), is certainly more difficult to distinguish. However, *Powell* stands in conflict to the opinion of this Court in *Caputo*. It is urged, therefore, that if *certiorari* be granted in either, the issue can be resolved by the Court's handling of *Powell*, in which a Petition for Writ of Certiorari is pending.

It seems to Respondent that *Powell* should also come within the warm embrace of the Amendments to the Longshoremen's and Harbor Workers' Compensation Act.

IV.

A LIBERAL AND BROAD INTERPRETATION SHOULD BE GIVEN TO THE ACT AS IT IS REMEDIAL IN NATURE

A.

There is no question but that an expansive and liberal interpretation should be given in particular reference to the extension of coverage of the Act to additional workers.

This Court observed in *Caputo* that:

The language of the Amendments is broad and suggests that we take an expansive view of the

extended coverage. Indeed such a construction is appropriate for this remedial legislation. The Act 'must be liberally construed in conformance with its purpose and in a way which avoids harsh and incongruous results.' *Voris v. Eikel*, 336 U.S. 328, 333 (1953)

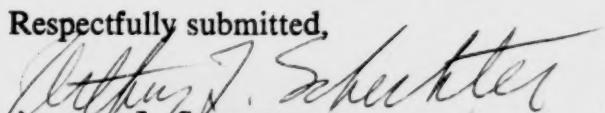
The Fifth Circuit has similarly noted that the Act should be so liberally construed in promotion of its compensatory purposes. *Alabama Dry Dock & Shipbuilding Co. v. Kininess and the Director, Office of Workers Compensation Programs, United States Department of Labor, supra.*

CONCLUSION

This Court has said previously in *Caputo* that a broad view should be taken. There is nothing in the *Bryant* case which is not within the parameters set out by this Court in *Caputo*. It is, therefore, urged that the Petition for Writ of Certiorari be in all things denied.

WHEREFORE, Respondent, WILL BRYANT, respectfully moves this Court to in all things deny the Petition for Writ of Certiorari.

Respectfully submitted,


ARTHUR L. SCHECHTER
2080 Two Shell Plaza
Houston, Texas 77002
(713) 223-1314

Attorney for Petitioner

Of Counsel:

SCHECHTER & SHELTON, INC.

In the Supreme Court of the United States
OCTOBER TERM, 1978

Supreme Court, U.S.

STALED

NOV 9 1978

P.C. PFEIFFER COMPANY, INC. AND MICHAEL RODAK, JR., CLERK
TEXAS EMPLOYERS' INSURANCE ASSOCIATION, PETITIONERS

v.

DIVERSON FORD AND DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR

AYERS STEAMSHIP COMPANY AND TEXAS EMPLOYERS'
INSURANCE ASSOCIATION, PETITIONERS

v.

WILL BRYANT AND DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT
OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

CARIN ANN CLAUSS
Solicitor of Labor

LAURIE M. STREETER
Associate Solicitor

GEORGE M. LILLY
JOSHUA T. GILLELAN II
Attorneys
Department of Labor
Washington, D.C. 20210

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-425

P.C. PFEIFFER COMPANY, INC. AND
TEXAS EMPLOYERS' INSURANCE ASSOCIATION, PETITIONERS

v.

DIVERSION FORD AND DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR

AYERS STEAMSHIP COMPANY AND TEXAS EMPLOYERS'
INSURANCE ASSOCIATION, PETITIONERS

v.

WILL BRYANT AND DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT
OF LABOR

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

MEMORANDUM FOR THE FEDERAL RESPONDENT

1. Respondent Ford, an employee of petitioner P.C. Pfeiffer Co., was injured at the Port of Beaumont, Texas, while securing a military vehicle into place on a railway flat car for shipment inland. The vehicle had arrived at

the port several days earlier; it had been unloaded from a seagoing vessel, stored for a period of time, and then loaded onto the flat car. Ford's work was thus the last step in transferring the cargo from sea to land transportation. Although Ford was not a longshoreman by trade, he was working at Pfeiffer's marine terminal at the time of his injury (Pet. App. 46). The administrative law judge held that Ford was not within the coverage of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, but the Benefits Review Board reversed and held that Ford is entitled to benefits under the Act.¹

The court of appeals affirmed the decision of the Benefits Review Board, holding that the work Ford was performing at the time of his injury "was evidently an integral part of the process of moving maritime cargo from a ship to land transportation" (Pet. App. 47). Since Ford unquestionably would have been covered by the Act if his work had been "part of a continuous operation which began with the cargo's departure from a ship's hold," coverage should not be denied, the court concluded, merely because the cargo had come to rest for the period of time that it was stored in the marine terminal (*ibid.*).

Respondent Bryant, an employee of petitioner Ayers Steamship Company, was injured while he was engaged in

¹Ford was held to be within the Act's coverage because his injury occurred in a shoreside area "customarily used by an employer in loading, unloading, repairing, or building a vessel," as required by Section 3(a) of the Act, 33 U.S.C. 903(a), and because he was deemed to be an "employee" under Section 2(3) of the Act, 33 U.S.C. 902(3). The definition of "employee," added in relevant part when the Act was amended in 1972, includes "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations."

his regular job of unloading cotton from wagons near a pier in Galveston, Texas. The cotton ordinarily is stacked in pier-side warehouses by "cotton headers" such as Bryant. The cotton remains there until employees denominated as "longshoremen" take it on board seagoing vessels for further shipment elsewhere (Pet. App. 48). As in Ford's case, the administrative law judge found that Bryant was outside the coverage of the Act, but the Benefits Review Board reversed, holding that because Bryant was engaged in longshoring operations and was injured at a maritime situs, he is entitled to benefits under the Act.

The court of appeals affirmed, holding that the Board had a reasonable legal basis for its conclusion that Bryant was performing longshoring operations (Pet. App. 49). Even though Bryant was not technically a longshoreman, the court observed, there would have been "no doubt that Bryant would be directly involved in 'longshoring operations' if, instead of setting the cargo down, he had handed it to a 'longshoreman' for immediate loading on board a ship" (*id.* at 49-50). The result should not be different, the court held, simply because the cotton remained at rest in the warehouse for some period of time before being loaded onto seagoing vessels: "The brief discontinuity in time created by the cotton's temporary storage did not alter the essential nature of Bryant's work, which was an integral part of the ongoing process of moving cargo between land transportation and a ship" (*id.* at 50).

2. This case presents an important issue left unresolved in this Court's decision in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 272-273 (1977): whether maritime employment, for the purposes of the Act, includes all physical cargo handling in the waterfront

area, and particularly tasks necessary to transfer cargo between land and water transportation. Although Caputo, one of the two claimants in *Northeast Marine*, was performing duties indistinguishable in any material respect from the duties performed by Ford and Bryant, Caputo was a regular member of a stevedoring gang and—unlike Ford and Bryant—was unquestionably a “longshoreman” by occupation. The Court held that Caputo was an “employee” within the meaning of the Act because he was a longshoreman; it therefore did not find it necessary to address the question whether his duties in transferring maritime cargo to and from land transportation constituted “longshoring operations” within the meaning of the Act and whether he was within the coverage of the Act on that ground as well.

This unresolved question has provoked a conflict among the courts of appeals. Although the Fifth Circuit in the instant case upheld the Board's ruling that shoreside loading and unloading operations to and from land transportation are “longshoring operations,” the Ninth Circuit has reversed the Board on the same issue, in *Cargill, Inc. v. Powell*, 573 F. 2d 561 (9th Cir. 1977), petition for cert. pending, No. 77-1543. The question whether and under what circumstances loading and unloading to and from land transportation in a marine terminal constitute “longshoring operations” has caused confusion in other courts of appeals as well. See, e.g., *I.T.O. Corp. v. Benefits Review Board*, 542 F. 2d 903 (4th Cir. 1976) (*en banc*), vacated and remanded in part *sub nom. Adkins v. I.T.O. Corp.*, 433 U.S. 904, on remand, 563 F. 2d 646 (4th Cir. 1977) (loading onto land transportation held covered); *Seq-Land Service, Inc. v. Director, Office of Workers' Compensation Programs*, 552 F. 2d 985 (3d Cir. 1977) (remanded for determination whether loading of land transportation was an integral

part of maritime operations); *Conti v. Norfolk and Western Ry.*, 566 F. 2d 890 (4th Cir. 1977) (unloading from land transportation not covered).

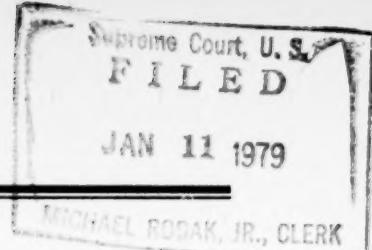
Because of the importance of the issue and because the conflict on the issue has divided two major deep-water circuits, we do not oppose the petition for a writ of certiorari in this case. As we stated in our memorandum in *Powell*, the instant case presents the issue in a more suitable context for resolution than does *Powell*. Petitioner in *Powell* was a longshoreman by trade, and he could be held to fall within the coverage of the Act on that basis alone, without the need to reach the question whether his activities in unloading grain from land transportation constituted “longshoring operations” within the meaning of Section 2(3) of the Act. Because neither Ford nor Bryant was a longshoreman, the instant case squarely presents the single issue on which the courts of appeals are in conflict. Accordingly, we recommend that the Court grant review in this case and hold the petition in *Powell* pending the disposition of this case.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

CARIN ANN CLAUSS
Solicitor of Labor
LAURIE M. STREETER
Associate Solicitor
GEORGE M. LILLY
JOSHUA T. GILLELAN II
Attorneys
Department of Labor

NOVEMBER 1978



IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

NO. 78-425

P. C. PFEIFFER CO., INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.
DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.
WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONERS

Of Counsel:

ROYSTON, RAYZOR,
VICKERY & WILLIAMS

E. D. VICKERY
W. ROBINS BRICE
3710 One Shell Plaza
Houston, Texas 77002
Attorneys for Petitioners

SUBJECT INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	3
QUESTIONS PRESENTED	3
STATUTES INVOLVED	5
STATEMENT OF THE CASE	6
SUMMARY OF ARGUMENT	12
ARGUMENT	17
Introduction	17
What Is "Maritime Employment" Under The Long-shoremen's Act?	19
A Definitive Maritime Employment Status Test ..	30
Will The Suggested Maritime Employment Status Test Work Other Than In Break-Bulk Cargo Handling Activities?	37
Does The Suggested Maritime Employment Status Test Meet The Court's Liberal Construction Doctrine For Remedial Legislation?	41
The Statutory Presumption Of Coverage	45
No Special Deference Is Owed To The Benefits Review Board In These Cases	46
CONCLUSION	49

LIST OF AUTHORITIES

CASES	Page
Anderson v. Johnson Lighterage Co., 224 N.Y. 539, 120 N.E. 55 (1918)	21
Calbeck v. Travellers Insurance Co., 370 U.S. 114, 125-126 (1962)	42
Cargill, Inc. v. Powell, 573 F.2d 561 (9th Cir. 1977), petition for cert. pending	29, 30, 34

II

CASES	Page
Case v. Los Angeles Lumber Products Co., 308 U.S. 106, 115 (1939)	14, 27
Conti v. Norfolk & Western Railway Company, 566 F.2d 890 (4th Cir. 1977)	29, 30
Del Vecchio v. Bowers, 296 U.S. 280 (1935)	17, 45, 46
Hardy Salt Company v. Southern Pacific Transportation Company, 501 F.2d 1156, at 1168 (10th Cir. 1974), cert. denied, sub nom. Sanders Brine Shrimp Co. v. Southern Pacific Transportation Co., 419 U.S. 1033 (1974)	14, 27
Keater v. Rock Plaster Mfg., 224 N.Y. 540, 120 N.E. 56 (1918)	21
Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920)	12, 21
Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969)	18, 22
Newman v. Chile Exploration Co., 232 N.Y. 37, 133 N.E. 120 (1921)	21
Newport News Shipbuilding & Dry Dock Company v. Director, Office of Workers' Compensation Programs, 583 F.2d 1273 (September 21, 1978)	43
Nogueira v. New York, N.H. & H.R. Co., 281 U.S. 128 (1930)	13, 14, 23
Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977)	<i>passim</i>
Pennsylvania R. Co. v. O'Rourke, 344 U.S. 334 (1953)	13, 14, 23, 26, 27, 28, 38
Perdue v. Jacksonville Shipyards, Inc., 539 F.2d 533 (1976)	2
Pettus v. American Airlines, Inc., ____ F.2d ____ (September 26, 1978)	43
Pittston Stevedoring Company v. Dellventura, 544 F.2d 35, 47 (2d Cir. 1976), aff'd sub nom. Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977)	47, 48
Southern P. Co. v. Jensen, 244 U.S. 205 (1917)	12, 21, 22
State Industrial Commission v. Nordenholt, 259 U.S. 263 (1922)	13, 21, 22, 23, 26, 27
Stockman v. John T. Clark & Son of Boston, 539 F.2d 264, 269 (1st Cir. 1976), cert. denied, 433 U.S. 908 (1977)	47, 48
United States v. Champlin Refining Co., 341 U.S. 290, at 297 (1951)	16, 43
Voris v. Eikel, 346 U.S. 328, at 333 (1953)	16, 41, 42
Weyerhauser Company v. Gilmore, 528 F.2d 957, 960 (9th Cir. 1976), cert. denied, 429 U.S. 868 (1976)	25
White v. Norfolk & Western Railway Company, 232 S.E.2d 807 (Va. 1977), cert. den'd, 434 U.S. 860 (1977)	29, 30

III

UNITED STATES STATUTES	Page
28 U.S.C. § 1254(1)	3
33 U.S.C. § 901, <i>et seq.</i>	<i>passim</i>
33 U.S.C. § 902(3)	5, 19
33 U.S.C. § 902(4)	6, 13
33 U.S.C. § 903(a)	6
33 U.S.C. § 905(a)	24
33 U.S.C. § 921(b)	48
33 U.S.C. § 921(b)(1)	47
33 U.S.C. § 921(b)(3)	47
33 U.S.C. § 919(d)	48
33 U.S.C. § 920	5, 45
33 U.S.C. § 920(a)	45

TEXTS

Davis, ADMINISTRATIVE LAW OF THE SEVENTIES (1976) pp. 688-693	47
2A Sutherland, STATUTORY CONSTRUCTION, § 54.04 (4th Ed. 1973)	43

MISCELLANEOUS

1972 U.S. Code Cong. & Administrative News, p. 4708	13, 25, 31
H. Rep. 92-1441, p. 11	13, 25, 31
H. Rep. 2058, 95th Congress, 2d Session	44
S. Rep. 92-1125, p. 13	13, 25, 31
S. 2008, 93d Congress, 1st Session, Cong. Rec. p. S11285	44
S. 3060, 95th Congress, 2d Session, introduced on May 11, 1978	44

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

NO. 78-425

P. C. PFEIFFER CO., INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.
DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.
WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

**On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit**

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

Two cases involving identical issues and complementary fact situations under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation

Act are before the Court for the second time. Both cases were dealt with in a single opinion by the Court of Appeals for the Fifth Circuit, reported sub nom *Perdue v. Jacksonville Shipyards, Inc.*, 539 F.2d 533 (1976), and reprinted as Appendix C to the Petition for a Writ of Certiorari in this case (hereafter Pet.), pages 30 to 55. The Court vacated the judgments based on that 1976 opinion and remanded these cases to the Court of Appeals for the Fifth Circuit for reconsideration in light of the Court's opinion in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977). The Court's Order of Remand is reported at 433 U.S. 904 (1977), and is reprinted as Appendix B to the Petition, Pet. p. 29.

After remand by the Court, the Court of Appeals below reaffirmed its earlier decision based on its prior opinion cited above. The court's brief opinion reaffirming its prior decision is reported at 575 F.2d 79 (5th Cir. 1978), and is reprinted as Appendix A to the Petition, Pet. pp. 27 to 28.

These cases had previously reached the Court of Appeals upon petition for review from the administrative tribunals of the United States Department of Labor. In both cases, the Administrative Law Judge found no federal jurisdiction, the Benefits Review Board reversed, and the Court of Appeals for the Fifth Circuit affirmed the Benefits Review Board. The opinion of Administrative Law Judge Vanderheyden in the *Ford* case is not reported but is printed as Appendix 4, App. pp. 20-40. The opinion of the Benefits Review Board of the Department of Labor in *Ford* is reported at 1 BRBS 367, and is reprinted as Appendix 5, App. pp. 41-45. The opinion of Administrative Law Judge Devaney in the *Bryant* case is not reported but is reprinted as Ap-

pendix 9, App. pp. 64-92. The opinion of the Benefits Review Board in *Bryant* is reported at 2 BRBS 408 and is reprinted as Appendix 10, App. pp. 93-98.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit on remand from the Court was rendered on June 16, 1978. The Petition for a Writ of Certiorari was filed September 13, 1978, and the Petition was granted November 27, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether by the 1972 Amendments to the Longshoremen's Act,¹ Congress intended to extend the jurisdiction of the Act ashore to categories of non-amphibious, warehouse or terminal workers who fail to satisfy any of the Court's post-amendment criteria for such jurisdiction, as enumerated in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977), because:

a. Prior to the 1972 Amendments they had, and still have, a uniform compensation system which provides "continuous coverage throughout their employment,"² and therefore are not subject to the "shifting and fortuitous coverage that Congress intended to eliminate."³

1. The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, was amended October 27, 1972, Public Law 92-576.

2. *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, at 273 (1977).

3. *Id.* at 274.

- b. They are not "amphibious workers," i.e., not subject to being assigned to work both aboard vessels and on land in the course of their employment;⁴
- c. They never perform any work on navigable waters, and
- d. They never engage in "indisputably longshoring operations,"⁵ i.e., they never unload (physically remove and store in warehouse) cargo from or load (physically remove from warehouse and place) cargo onto a vessel.

2. Whether the employee Bryant meets the "status test" required for Longshoremen's Act jurisdiction when as a "cotton header" (terminal worker) he was unloading cotton bales from a cotton dray wagon and storing them in a pier-side warehouse to await the subsequent arrival in port (five days later) of the vessel on which the cotton was to be loaded (physically removed from such storage and placed aboard the vessel) by longshoremen employed by a stevedoring company completely independent from and unrelated to Bryant's employer?

3. Whether the employee Ford meets the "status test" required for Longshoremen's Act jurisdiction when as a member of a warehouse labor gang he was securing a military vehicle onto a railroad car on the dock after the vehicle had been in storage on or near the dock since the time the delivering vessel had sailed (two to seventeen days before), and Ford's employer had in no way participated in the longshoring operations of unloading

4. *Id.* at 273.

5. *Id.*

(physical removal from vessel and placing in storage area on dock) of the military vehicle from the vessel?

- 4. In reaching conflicting results on the basic jurisdictional issue of the extent to which Congress intended to extend the Longshoremen's Act ashore, the various Courts of Appeals also reached conflicting and diverging results on two subsidiary questions on which an authoritative decision by the Court is needed:
 - a. What, if any, weight is to be given to the statutory presumption that a claim comes within the provisions of the Act, 33 U.S.C.A. § 920, which this Court has held to be inapplicable when there is substantial evidence in the record on the facts at issue.⁶
 - b. What, if any, deference is owed by a Court of Appeals to the holdings of the Benefits Review Board on the question of the statutory jurisdiction of the Longshoremen's Act?⁷

STATUTES INVOLVED

The relevant portions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, are as follows:

Section 2(3), 86 Stat. 1251, 33 U.S.C. § 902(3):

"The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not

6. See discussion *infra*, p. 45.

7. See discussion *infra*, p. 46.

include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

Section 2(4), 86 Stat. 1251, 33 U.S.C. § 902(4):

"The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

Section 3(a), 86 Stat. 1251, 1265, 33 U.S.C. § 903(a):

"Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). * * *"

STATEMENT OF THE CASE

In 1977, this Court rendered its first decision interpreting the 1972 shoreside extension of Longshoremen's Act jurisdiction. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 53 L.Ed.2d 320, 97 S.Ct. 2348 (1977). The present two cases⁸ were pending in this court at that time. After its decision in *Caputo*, this

8. Two cases presenting complementary fact situations (loading/unloading) were decided together by the court below and have been brought to this Court in a single petition. Rule 23(5), Rules of the Supreme Court of the United States.

Court vacated the judgments of the Court of Appeals in these cases and remanded them for reconsideration in light of *Caputo*.⁹

Petitioners are employers¹⁰ of persons who work in the dockside areas adjoining navigable waters. The respondent employees are workers who sustained injuries while transferring breakbulk cargo to or from land transportation in a shoreside storage area.¹¹ At the time of his injury Respondent Ford was standing on a railroad flatcar securing a military vehicle for carriage to an inland arsenal.¹² The military vehicle had been returned to the United States on a ship and had been stored in an open, shoreside storage area pending its on-carriage by rail. The ship which delivered the military vehicle had departed at least two days and possibly as many as seventeen days prior to the day of the accident,¹³ and Ford and his co-workers were hired from the Warehousemen's Local Union of the International Longshoremen's Association to secure the military vehicles on the railcars. No ship was at the dock, and in any event, the applicable labor contract would have prohibited these workers from the Warehousemen's Local Union from working aboard ships or assisting in the movement of cargo directly to or from ships.¹⁴

9. 433 U.S. 904 (1977), Pet., p. 29.

10. And their compensation insurance underwriter.

11. Both were injured in an adjoining area ashore which meets the situs requirements for jurisdiction under the Longshoremen's Act. Thus this case involves only the maritime employment status requirements of the Act.

12. App. p. 6 (Stip.), 24 (ALJ Opinion below).

13. App. p. 7 (Stip.), 25 (ALJ Opinion below).

14. App. p. 11 (Stip.), 30 (ALJ Opinion below).

Respondent Bryant was injured while standing on a cotton dray wagon utilized to bring cotton bales from the compress company to a shoreside warehouse for eventual shipment overseas.¹⁵ He was assisting the wagon driver in unloading the bales from the wagon and “heading” them into a storage location in the pier-side warehouse.¹⁶ The cotton bales being handled were subsequently loaded aboard a ship which arrived in port five days after Bryant’s injury. Petitioner (Bryant’s employer) performs no longshoring operations—no ship loading or unloading work—at any time, and the bales in question were eventually loaded aboard ship (physically removed from warehouse and placed aboard ship) by longshoremen employed by a stevedoring company completely unrelated to Bryant’s employer.¹⁷ In fact Bryant’s employer never loaded or unloaded any vessels.

In *Caputo* the Court recognized (1) that prior to the 1972 Amendments only the employer had to satisfy the “maritime employment” status requirement, and the injured employee had to meet only the situs requirement, and (2) that the 1972 Amendments for the first time required the injured employee to meet the maritime employment status requirement in addition to the situs requirement.¹⁸ In determining whether employees Blundo and Caputo met the maritime employment status requirement, the Court recognized the two motives of the Congress in extending the Act’s coverage ashore:

1. As to employees like Blundo, Congress’ motivation came from its “recognition that ‘the advent

of modern-cargo handling techniques’ had moved much of the longshoremen’s work off the vessel and onto land.”¹⁹ The Court held that a container is a “modern substitute for the hold of the vessel,” that the loading and unloading of containers ashore was work that prior to this modern cargo handling technique had been performed onboard ship, and thus that Blundo met the maritime employment status requirement of the 1972 Amendments.²⁰

2. As to employees like Caputo, engaged in break-bulk cargo, Congress was motivated by its desire to provide a uniform compensation system for “amphibious workers who without the 1972 Amendments, would be covered for only a part of their activity,”²¹ and thus put an end to the pre-1972 system in which an employee’s compensation remedy, whether state or federal, was determined by the “fortuitous circumstance of whether the injury occurred on land or over water.”²² The Court held Caputo was such an amphibious worker because (1) he was a member of a regular stevedoring gang, (2) he was subject to being assigned to work on the pier or on navigable waters aboard a vessel on the day of his injury, (3) his work assignment was subject to being changed during the day from the pier to a vessel or vice versa, and (4) without the 1972 Amendments, he would have had a

15. App. p. 47 (Stip.), 69 (ALJ Opinion below).

16. *Id.*

17. App. pp. 49-50 (Stip.), 68, 70 (ALJ Opinion below).

18. 432 U.S. at 264-265.

19. 432 U.S. at 269-270.

20. 432 U.S. at 270-271.

21. 432 U.S. at 273.

22. 432 U.S. at 272.

non-uniform compensation remedy—the Longshoremen's Act for his work on navigable waters and a State Act for his work on the dock.²³

In the two cases presently before the Court, the Congressional desire to accommodate the Act to modern cargo handling techniques is not relevant for precisely the same reason the Court held it not relevant to Caputo's case: Caputo was injured while engaged "in the old-fashioned process of putting goods already unloaded from a ship or container into a delivery truck."²⁴ Ford was injured when engaged in the equally old-fashioned process of securing a military vehicle unloaded from a ship days before to a railroad car for transportation inland, and Bryant was engaged in the old-fashioned process of unloading a bale of cotton from a delivery wagon for storage in the warehouse for five days after which it would be loaded aboard a ship. These cases therefore relate solely to the Court's opinion as to Caputo who was also working with break-bulk cargo.

Unlike Caputo, however, neither Ford nor Bryant was an amphibious worker who did not have a uniform compensation remedy prior to the 1972 Amendments—both had and still have a perfectly uniform compensation system (state law) which covers all of their work activities both before and after the 1972 Amendments. Nor do Ford and Bryant satisfy any of the other three criteria on which the Court relied in holding Caputo to be an amphibious worker for whom Congress desired to provide a uniform compensation system: (1) Neither was a member of a regular stevedoring gang who "par-

23. 432 U.S. at 273-274.

24. 432 U.S. at 271-272.

ticipated on either the pier or the ship in the stowage and unloading of cargo."²⁵ (2) Both were hired as terminal or warehouse laborers and were not subject to being assigned to load or discharge vessels.²⁶ (3) Both were aware of their work assignments being limited to warehouse work and not subject to being changed during the day.²⁷ Thus, neither Ford nor Bryant is an amphibious worker like Caputo, but upon remand the Court below obviously did not consider these four factors to be of any significance (since none was present in *Bryant* or *Ford*), and simply adhered to its earlier holding that all work which is "an integral part of the process of moving maritime cargo from ship to land transportation" or vice versa is covered if performed in an area meeting the situs test.²⁸ Thus, these two cases squarely present the ultimate question which the Court declined to reach in *Caputo*:

"Whether Congress intended the 1972 Amendments to the Longshoremen's Act to cover 'all physical cargo handling activity anywhere within an area meeting the situs test' or only those 'amphibious workers' such as Caputo who had no uniform compensation remedy prior to the 1972 Amendments?"

25. 432 U.S. at 273. Ford: App. pp. 17 (Stip.); 27 (ALJ op. below). Bryant: App. pp. 49 (Stip.); 68-69 (ALJ op. below).

26. 432 U.S. at 273-274. Ford: App. pp. 8, 11 (Stip.); 25, 27 (ALJ op. below). Bryant: App. pp. 48 (Stip.); 69 (ALJ op. below).

27. 432 U.S. at 274. Ford: App. pp. 18 (Stip.); 28 (ALJ op. below). Bryant: App. p. 49 (Stip.); 68 (ALJ op. below).

28. The Court below simply said its prior opinion "was consistent with the rationale" of the Court in *Caputo*. 575 F.2d at 80, Pet. p. 28. Quite to the contrary, the Fifth Circuit position is absolutely inconsistent with the coverage analysis of employee Caputo.

SUMMARY OF ARGUMENT

I.²⁹

In *Caputo*,³⁰ the Court held that a terminal worker engaged in the old-fashioned process of loading a truck with cargo that had previously been unloaded from a vessel met the maritime employment status requirement of the 1972 Amendments to the Longshoremen's Act, because he was a longshoreman by occupation and he was an amphibious worker who was subject to being assigned to work both on navigable waters and on shore on the day of his accident. The Court held such an amphibious worker met the status requirement because he was the type of employee for whom Congress desired to provide a uniform compensation remedy. Ford and Bryant are neither regular longshoremen nor amphibious workers and thus do not meet either *Caputo* criterion. The court below ignored the *Caputo* criteria and adopted the Federal Respondent Director's concept that maritime employment meant any physical tasks performed on the waterfront with respect to maritime cargo.

The maritime employment status requirement, which originally only employers had to meet, was made a requirement which employees also had to meet by the 1972 Amendments. Prior to the passage of the Longshoremen's Act in 1927, decisions of the Court had determined that for workmen's compensation purposes, maritime employment meant work on the navigable waters,³¹ and shore-

29. Full argument, *infra*, pages 17 to 30.

30. *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977).

31. *Southern P. Co. v. Jensen*, 244 U.S. 205 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

side handling of maritime cargo even during the loading and unloading of a vessel was not maritime employment.³² Congress effectively adopted this definition of maritime employment in the Act by providing that only those employers "any of whose employees are employed in maritime employment in whole or in part on the navigable waters of the United States" were covered employers.³³ Only three years after the passage of the Act, the Court held a railroad worker was injured while engaged in maritime employment only because a part of his work was on navigable waters,³⁴ and reaffirmed this holding in 1953 in another railroad worker case.³⁵

That Congress intended the term "maritime employment" in the 1972 Amendments to have the same meaning the Court had given it—employment at least a part of which is performed on navigable waters—is clearly confirmed by the legislative history.³⁶ Under the familiar rule of statutory construction applicable where Congress

32. *State Industrial Commission v. Nordenholt*, 259 U.S. 263 (1922).

33. 33 U.S.C. § 902(4).

34. *Nogueira v. New York, N.H. & H.R. Co.*, 281 U.S. 128 (1930).

35. *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334 (1953).

36. Both the Senate and House Committee Reports conclude their "shoreside coverage" sections as follows:

"... Likewise, the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part, in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters is not covered even if injured on a pier adjoining navigable waters." S. Rep. 92-1125, p. 13; H. Rep. 92-1441, p. 11; 1972 U.S. Code Cong. & Administrative News, p. 4708.

employs words in a statute which have a well known or judicially settled meaning, it is presumed that Congress intended them to have that meaning in the statute.³⁷

This definition of maritime employment is required to prevent many dockside railroad workers from being divested of their Federal Employers' Liability Act remedy, as it is clear the Longshoremen's Act is the exclusive remedy of such railroad workers whenever it conflicts with the FELA.³⁸

The Court below erroneously looked to the maritime nature of the *cargo* being handled and not to the non-maritime nature of the claimants' *employment*, as defined by the Court and adopted by Congress in the 1972 Amendments, and this error is demonstrated by the last two sentences of the coverage sections of the legislative committee reports. As neither Ford, Bryant, nor any of their co-workers was subject to being assigned by their employer to work on navigable waters on the day of their injuries, they were not amphibious workers and do not have the maritime employment status required of employees by the 1972 Amendments.

II.³⁹

A definitive maritime employment status test can be simply stated:

37. *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, at 115 (1939); *Hardy Salt Company v. Southern Pacific Transportation Company*, 501 F.2d 1156, at 1168 (10th Cir. 1974), cert. denied, *sub nom. Sanders Brine Shrimp Co. v. Southern Pacific Transportation Co.*, 419 U.S. 1033 (1974).

38. *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334 (1953); *Nogueira v. New York, N.H. & H.R. Co.*, 281 U.S. 128 (1930).

39. Full argument, *infra*, pages 30 to 41.

On the date of his injury, was the employee subject to being assigned by his employer to perform any part of his work on the navigable waters of the United States?

If answered in the affirmative, the employee is one for whom Congress desired to establish the Longshoremen's Act as his uniform compensation system, whether he was hurt on navigable waters or on an adjoining area ashore. If answered in the negative, the employee had in 1972 and still has a uniform compensation remedy under state law, and Congress did not intend to alter or change that to any extent. This test is fully consistent with the principal criteria of *Caputo*, and provides the amphibious worker with the uniform compensation remedy Congress desired him to have, while leaving the non-amphibious worker ashore with the same uniform remedy he had in 1972 and still has under the state law.

The suggested maritime employment status test can also be easily applied to other work on the waterfront other than the break-bulk cargo handling activities involved in *Caputo*, *Ford* and *Bryant*. Other types of employees, such as ship chandlers or ship suppliers, marine surveyors, ship cleaners, etc., were subject to walking in and out of coverage under the Longshoremen's Act prior to the 1972 Amendments, because a part of their work was done on navigable waters. The Director's proposed test is completely unworkable as to these amphibious workers because none are involved in the physical handling of cargo to or from either water or land transportation. The simple inquiry whether an employee is subject to being assigned to work on navigable waters as well as on an adjoining area determines maritime employment status, whatever his actual work might be at the moment of injury.

III.⁴⁰

Petitioners' suggested maritime employment status test clearly meets the Court's doctrine that the "Act must be liberally construed in accordance with its purpose,"⁴¹ which the court below distorts into its own doctrine that the Act is to be "liberally construed in favor of injured workers."⁴² The court below thus advocates that jurisdiction be decided by determining whether the state or the federal act is more favorable to the employee.

Petitioners' suggested expression of the status test conforms fully with the Congressional purpose to make the Longshoremen's Act the uniform compensation remedy for amphibious workers like Caputo who prior to the 1972 Amendments were covered by the federal remedy only for that part of their work activity on navigable waters and by a state act for their work activity on land. And the test leaves undisturbed the uniform compensation remedy provided by state law for non-amphibious workers like Ford and Bryant whose work activity is solely on land. The 1972 Amendments should not be construed to extend beyond the specific evil they sought to eliminate, that is, the lack of uniformity of the compensation remedy of amphibious workers only.⁴³

The Congressional purpose did not intend to solve the disparity in benefits payable under the state and federal acts as to non-amphibious workers handling potential maritime cargo on an adjoining area as the Federal

40. Full argument, *infra*, pages 41 to 49.

41. *Voris v. Eikel*, 346 U.S. 328, at 333 (1953).

42. 539 F.2d at 541, Pet. p. 42.

43. *Cf. United States v. Champlin Refining Co.*, 341 U.S. 290, at 297 (1951).

Respondent Director proposes. The introduction of various bills starting in 1973 to correct this general inadequacy, not just on the waterfront, but throughout the country, by requiring the state acts to meet certain benefit standards demonstrates this.

Petitioners' suggested maritime employment status test is as liberal an interpretation of the 1972 Amendments as the Congressional purpose will permit. Both administrative law judges below found that liberality or generosity should not distort the Congressional purpose. The presumption of coverage in the Longshoremen's Act plays no part in cases such as these in which substantial evidence has been presented to the fact finder.⁴⁴ No deference to the decisions of the Benefits Review Board is owed by the federal judiciary in these cases of statutory interpretation of the jurisdictional provisions of the Act, as is demonstrated by this Court's detailed treatment of the jurisdiction issue in *Caputo*. The opinion of the court below should be reversed and these claims dismissed for want of federal coverage.

ARGUMENT

Introduction

The present cases involving break-bulk cargo come to the Court for resolution in light of *Caputo*. Leaving aside the *Blundo* containerization analysis as irrelevant, 432 U.S. at 271-272, *Caputo* held that a worker who was a longshoreman by occupation would be covered by the Longshoremen's Act even while loading cargo from a storage point to land transportation on a covered situs, provided the worker was subject to being assigned by his

44. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

employer on the date of his injury to work both aboard vessels and ashore. The elements looked to by the Court in determining that he was a longshoreman by occupation were membership in a regular stevedoring gang which loaded and unloaded vessels, uncertainty as to whether one's duties on any given day would be aboard a vessel or on the docks, and the potential to be assigned to work both on a vessel and on the dock on the same day. None of these factors is present in the *Ford* and *Bryant* cases, as is recognized by the Federal Respondent in conceding that neither Ford nor Bryant was a longshoreman by occupation.⁴⁵ The clearly focused issue is whether persons such as Ford and Bryant, who are not longshoremen by occupation, but who are in an area adjoining navigable waters and engaged in loading or unloading land transportation, were intended by Congress to be covered by the Longshoremen's Act as extended ashore by the 1972 Amendments. The statutory language and the legislative history indicate that these additional categories of workers who had in 1972, and still have, a uniform compensation system were not intended to be covered, and the following considerations clearly demonstrate that Congress intended to extend Longshoremen's Act coverage ashore only to those workers "who, without the 1972 Amendments, would be covered for only part of their activity."⁴⁶

45. Memorandum for Federal Respondent, No. 78-425, pp. 4, 5.

46. 432 U.S. at 273. Without the 1972 Amendments an "amphibious worker" employed as a member of a gang of longshoremen to load or unload a vessel would be covered only for that part of his work performed while on the navigable waters of the United States aboard a vessel, and would be covered by a state workmen's compensation act for that part of his work performed while ashore on the dock, inside the warehouse, etc. After many years of litigation this jurisdictional line was finally clearly drawn at the water's edge in *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969).

WHAT IS "MARITIME EMPLOYMENT" UNDER THE LONGSHOREMEN'S ACT?

The statutory language which creates the "status" requirement occurs in the definition of the term "employee":

"The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, * * * " 33 U.S.C. § 902(3).

Much of the judicial verbiage expended on the 1972 Amendments has directed itself to the words "longshoreman" or "longshoring operations", but the basic category which creates the status requirement is "maritime employment." This same term—"maritime employment"—has been present in the Longshoremen's Act in the definition of the term "employer" since its original enactment in 1927.⁴⁷

The Federal Respondent Director asserted in *Caputo* and reasserted in its Memorandum on the present Petition for Certiorari in these cases that

"Maritime employment . . . includes all physical tasks performed on the waterfront, and particularly those tasks necessary to transfer cargo between land and water transportation." 432 U.S. at 272; Memorandum, at 3, 4.

As the Court recognized in *Caputo*,⁴⁸ the 1972 Congressional Committee Reports make it clear that the Director's cover-the-waterfront position is untenable when they state that ". . . employees whose responsibility is only

47. Cf: *Caputo*, *supra*, 432 U.S. at 264.

48. 432 U.S. at 267.

to pick up stored cargo for further transshipment would not be covered . . ."⁴⁹ The Court quite properly concluded that the truck driver who was engaged with Caputo "in the old-fashioned process of putting goods already unloaded from a ship or container into a delivery truck" did not meet the maritime employment status test for coverage, although he obviously met the situs test if Caputo did.

Thus, the Director's contention that all physical tasks performed on the waterfront necessary to transfer cargo between land and water transportation are "maritime employment" within the meaning of the Act is completely unsupportable, for there can be no question that the truck driver was engaged in the same physical tasks on the waterfront as was Caputo.

At the oral argument in *Caputo*, having first verified that there was no definition of the term "maritime employment" in the Act itself, Mr. Justice Rehnquist then inquired whether there was a definition by which the Court could be guided. Unfortunately, this question was not fully answered, and the Court is confronted with this same question once again.⁵⁰ The definition by which the Court not only can, but should, be guided is found (1)

49. S. Rep. 92-1125, p. 13; H. Rep. 92-1441, p. 11; 1972 U.S. Code Cong. and Administrative News, p. 4708.

50. Counsel for the Petitioners herein filed a Brief Amicus Curiae on behalf of the West Gulf Maritime Association (of which both Petitioners are members) in *Caputo* in which the Court's attention was directed to these prior decisions and these two sentences of the legislative history. While the Court did not refer to them in the context of a definition in *Caputo*, one of the key factors, if not the principal factor, in this Court's holding that *Caputo* met the maritime employment status test—that he was subject to being assigned to work both on navigable waters and on the pier on the date of his accident—is fully supported by these prior decisions and the legislative history.

in the prior decisions of the Court determining what constitutes maritime employment for workmen's compensation purposes and (2) in the last two sentences of the 1972 Committee Reports relating to the extension of jurisdiction ashore, which clearly and unmistakably demonstrate that Congress did not intend to change the definition of the term "maritime employment" in its 1972 Amendments to the Act insofar as break-bulk cargo operations are concerned.

The prior decisions of this Court reveal an historical definition or understanding of the term "maritime employment." Until the Court's decision in *State Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263 (1922), the courts of the State of New York had repeatedly held that in the context of a state workmen's compensation law, shoreside handling of maritime cargo during the loading and unloading of a vessel was "maritime employment," and the Constitutional exclusivity of the Federal admiralty and maritime jurisdiction therefore precluded the application of a state workmen's compensation law to such shoreside maritime cargo handling activity.⁵¹ The New York Supreme Court had based its holdings on *Southern P. Co. v. Jensen*, 244 U.S. 205 (1917) and *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), in which this Court held that longshoremen injured aboard vessels were within the exclusive Federal admiralty and maritime jurisdiction, and their employment under a maritime contract to load or unload a vessel was maritime employment. The New York court had concluded that any physical task involved in the loading and unloading

51. *Keater v. Rock Plaster Mfg. Co.*, 224 N.Y. 540, 120 N.E. 56 (1918). *Anderson v. Johnson Lighterage Co.*, 224 N.Y. 539, 120 N.E. 55 (1918). *Newman v. Chile Exploration Co.*, 232 N.Y. 37, 133 N.E. 120 (1921).

of a vessel whether on the dock or on the vessel was therefore maritime employment. In *Nordenholt* this Court stated the New York courts had "proceeded upon an erroneous view of the Federal law,"⁵² and held that dock-side maritime cargo handling activities, even those directly involved in loading and unloading a vessel, were not "maritime employment," that such employment was not within the exclusive admiralty and maritime jurisdiction of the United States, and that such work ashore was within the jurisdiction of the state's workmen's compensation laws.

As the Court recognized in *Caputo*, the *Jensen* and *Nordenholt* cases left to the exclusive admiralty and maritime jurisdiction of the United States only those injuries occurring on the seaward side of the pier, and after two Congressional attempts to authorize states to apply their own compensation statutes to injuries sustained in maritime employment on navigable waters, Congress passed the Longshoremen's Act in 1927. 432 U.S. at 256. In the Act as originally passed, Congress expressly provided that only those employers "any of whose employees are employed in maritime employment, in whole or in part on the navigable waters of the United States (including any dry dock)," were covered.⁵³ Thus, Congress in 1927 effectively adopted the *Jensen-Nordenholt* definition of maritime employment for workmen's compensation purposes—only work performed on navigable waters is maritime employment, and that performed on the dock is not.⁵⁴

52. 259 U.S. at 272.

53. 33 U.S.C. § 902(4).

54. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969).

It took only three years for the Court to be confronted for the first time with the meaning of the term "maritime employment" as used in the Longshoremen's Act. In *Nogueira v. New York, N.H. & H.R. Co.*, 281 U.S. 128 (1930), this Court held that a railroad worker loading freight into railroad cars on a car float was in "maritime employment" within the meaning of the Act only because a part of his work on the day of the accident was on the navigable waters of the East River in New York Harbor. In so doing the Court expressly reaffirmed its holding in *Nordenholt* that work performed on a dock in unloading a vessel was not maritime employment, and therefore not covered by the Longshoremen's Act.⁵⁵

Some 23 years later yet another railroad worker was before the Court asserting that he was not engaged in "maritime employment" within the meaning of the Act when he was injured aboard a car float on navigable waters while performing his duties as a railroad brakeman. *Pennsylvania R.R. Co. v. O'Rourke*, 344 U.S. 334 (1953). Indeed, O'Rourke had persuaded the Court of Appeals for the Second Circuit that his railroad brakeman's duties were sufficiently different from those of the railroad worker in *Nogueira* to make him not engaged in maritime employment. In resolving the conflict

55. 281 U.S. at 133. The Court said in part:

"In *State Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263, 66 L.Ed. 933, 25 A.L.R. 1013, 42 Sup. Ct. Rep. 473, 21 N.C.C.A. 862, a longshoreman was injured on a dock while engaged in unloading a vessel. It was decided that in such a case, where the injury took place on an extension of the land, the maritime law did not prescribe the liability and the local law had always governed. The Workmen's Compensation Law of the State was accordingly held to be applicable. The distinction was thus maintained between injuries on land and those which were suffered by persons engaged in maritime employment on a vessel in navigable waters."

thus created by the Second Circuit with its opinion in *Nogueira*, the Court expressly reaffirmed that maritime employment as the term is used in the Longshoremen's Act means that employment which is performed on navigable waters, saying in part:

"Whether the injury occurred to an employee loading freight into cars on the float, as in the *Nogueira* case, or to one like respondent moving loaded cars from a float could make no difference. Both employments are maritime. See *Nogueira v. New York, N.H. & H.R. Co.*, *supra* (281 U.S. at 134)." 344 U.S. at 339, 340.⁵⁶

Both *Nogueira* and O'Rourke sought to avoid being held to be engaged in "maritime employment" within the meaning of the Act, as they preferred what were then the more liberal benefits afforded railroad workers who could recover damages under the Federal Employers Liability Act. However, these men having been injured on a covered situs, the Court properly held in both cases that their exclusive remedy was under the Longshoremen's Act.⁵⁷

Thus at the time the 1972 Amendments to the Act were passed, the Court's prior decisions had established that the term maritime employment as used in the Act meant that work at least a part of which was performed on navigable waters.

That the Congress intended the term maritime employment to have the same meaning after the 1972

56. Mr. Justice Minton's opinion for the four dissenting justices emphasizes that the question at issue was the meaning of "maritime employment," and that the key factor was employment "over navigable waters." 344 U.S. at 342-343 (dissenting opinion).

57. Cf: 33 U.S.C. § 905(a).

Amendments as to break-bulk cargo, and that wholly dockside work is still not to be considered maritime employment under the Act, is clearly stated in the last two sentences of the Extension of Coverage to Shoreside Areas sections in both the Senate and House Committee Reports.⁵⁸

". . . Likewise, the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part, in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters is not covered even if injured on a pier adjoining navigable waters."⁵⁹

58. S. Rep. 92-1125, p. 13; H. Rep. 92-1441, p. 11; 1972 U.S. Code Cong. and Administrative News, p. 4708.

59. The Court recognized in *Caputo* that Congress broadened "the definition of navigable waters of the United States". 432 U.S. at 263. These two sentences also make it clear that in broadening "the definition of navigable waters of the United States" to include adjoining shoreside areas, Congress was doing so as to the situs requirement only. Had it intended for all physical cargo handling activities on such adjoining areas to satisfy the maritime employment requirement, it never would have included these two sentences, nor specifically excluded such adjoining area workers as the consignee's truck driver who physically handled the same cargo as *Caputo*. Nor would it have made the maritime employment requirement which prior to the 1972 Amendments had applied only to employers applicable to the employees as well. Without the maritime employment requirement added for employees, the broadened definition of navigable waters relating to situs was all that would have been necessary to extend coverage to *Caputo*, *Ford* and *Bryant* for their injuries ashore in an adjoining area. It is the added requirement of maritime employment—being subject to assignment to work in part on navigable waters—which extends the Act's jurisdiction to *Caputo*, but not to *Ford* and *Bryant*. Cf. *Weyerhauser Company v. Gilmore*, 528 F.2d 957, 960 (9th Cir. 1976), cert. denied, 429 U.S. 868 (1976).

In these two statements, the Congressional Committees have made it clear that an employer is not engaged in "maritime employment" if none of his employees work, in whole or in part, on navigable waters, even if his employees work on and are injured on an area adjoining navigable waters. Thus, the historical concept first articulated in *Nordenholt*, that shoreside handling of maritime cargo is not maritime employment for workers' compensation purposes was expressly adopted by the Congressional Committees in 1972. In terms of the immediate problem of determining whether the Longshoremen's Act reaches Ford and Bryant, it is clear that these two workers cannot meet the historical definition of maritime employment. Caputo and Blundo, on the other hand, both were subject to assignment on navigable waters at the time of their injuries, and their work on the date of their injury may thus be recognized as maritime employment under the historical definition. The court below, however, rather than focusing on maritime *employment*, looked to the handling of maritime *cargo*, holding that any worker handling water-borne cargo is covered by the Longshoremen's Act if injured in an area adjoining navigable waters. The court below did not address itself to the historical definition of the term or to the last two sentences of the legislative history.⁶⁰

60. The Court below considered *O'Rourke* "scattered dicta" on the maritime employment requirement, 539 F.2d at 539 n. 12, Pet. pp. 37-38, and overlooked the Court's reaffirmation of the *Jensen-Nordenholt-Nogueira* meaning of maritime employment for workmen's compensation purposes. This reaffirmation by the Court of the meaning of "maritime employment" in the Act is frequently overlooked, because the Court in *O'Rourke* also made it clear that only the employer was required to meet the "maritime employment" test in that pre-1972 Amendments case, and held that even if *O'Rourke* himself could be labeled as only a railroad worker, the railroad was still an employer under the Act because it had other employees who

In addition to the foregoing expression by the Congressional Committees of the meaning of the "maritime employment" concept, a familiar rule of statutory construction dictates that,

"When Congress uses words in a statute without defining them, and those words have a judicially settled meaning, it is presumed that Congress intended them to have that meaning in the statute."⁶¹

Thus "maritime employment" as interpreted by *Nordenholt*, *Nogueira* and *O'Rourke* may be seen to have been adopted by the Congress when it reused the phrase in the 1972 Amendments, especially in view of the last two sentences of the Committee Reports, as discussed above.

As *Caputo* holds, however, after the 1972 Amendments the employee as well as the employer must be "engaged in maritime employment" and the injury must occur on a covered situs either afloat or ashore to come within the Act's expanded jurisdiction. Thus, as those last two sentences of the Committee Report's section on coverage clearly indicate, an employee who is not subject to working in whole or in part on navigable waters does not meet the maritime employment require-

satisfied the "maritime employment" requirement in the Act's definition of an employer. Once again, however, those other railroad employees who made the railroad an employer were found to be engaged in "maritime employment" only because a part of their work was performed upon navigable waters, as is emphasized by the dissenting opinion in *O'Rourke*, 344 U.S. at 342.

61. *Hardy Salt Company v. Southern Pacific Transportation Company*, 501 F.2d 1156, 1168 (10th Cir. 1974), cert. denied *sub nom. Sanders Brine Shrimp Co. v. Southern Pacific Transportation Co.*, 419 U.S. 1033 (1974). The same principle is expressed by this Court in *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 115 (1939).

ment for the same reason that an employer does not meet it who has no employees who work, in whole or in part, on navigable waters.⁶² It is undisputed that neither Ford nor Bryant can meet the historical definition of maritime employment, which the Congress adopted in passing the 1972 Amendments. Neither of them was subject to being assigned to work, in whole or in part, aboard a vessel on navigable waters on the date of his injury. App. pp. 10, 48. Bryant had not been subject to such a waterborne assignment and had done no work on navigable waters for five or six years prior to his injury. App. p. 49.

The use of the historical definition of maritime employment under the Longshoremen's Act is further mandated by the fact that at least as to railroad workers within its jurisdiction, the Longshoremen's Act is exclusive of all other employee's remedies against an employer. Both *Nogueira* and *O'Rourke*, in which this historical definition was reaffirmed by the Court, expressly held that railroad employees who were injured aboard a car float on navigable waters had the Longshoremen's Act as their exclusive remedy against their railroad employer.

62. As Petitioners both had other employees who worked in part on navigable waters, both satisfied the maritime employment requirement for employers. Bryant's employer, Ayers Steamship Company, served as local agent for vessels in the Port of Galveston and therefore had employees who would go aboard vessels to assist the Master in clearing customs, immigration, etc. on arrival and in other ways while the vessel was in port. But Bryant's employer had no long-shoring operations of any kind and did not load or unload any vessels, even those for which they provided other agency services. App. pp. 49, 50. Ford's employer, P. C. Pfeiffer, Inc., also served as local agent for vessels, had a warehouse division by whom Ford was employed at the time of his injury, whose work was entirely ashore, and a stevedoring division which loaded and unloaded vessels. App. p. 8.

If the position of the Director—all physical tasks on the waterfront—is adopted, this exclusivity of the Longshoremen's Act divests many dockside railroad workers of their FELA remedy, a result wholly unconsidered and unintended by the Congress. This result has been avoided in two recent cases by holding that such railroad employees are not in maritime employment even though assisting in transferring cargo between land transportation and a ship. *Conti v. Norfolk & Western Railway Company*, 566 F.2d 890 (4th Cir. 1977); *White v. Norfolk & Western Railway Company*, 232 S.E.2d 807 (Va. 1977), cert den'd, 434 U.S. 860 (1977). It was clear to these courts that the employees were engaged in unloading railroad trains, rather than loading ships, as they assisted in removing cargo from railroad cars in a shore-side terminal area onto conveyor systems which took it to the vessel for loading.⁶³ From this viewpoint, it is equally clear that Ford was loading a railroad car, and Bryant was unloading a cotton wagon, even though the cargo they were handling was originally or eventually waterborne.

Clearly the Fourth Circuit in *Conti* and the Supreme Court of Virginia in *White* were looking to whether or not the *employment* was maritime, rather than to whether the *cargo* was maritime. This same approach was adopted by the United States Court of Appeals for the Ninth Circuit in *Cargill, Inc. v. Powell*, 573 F.2d 561 (9th Cir. 1977), petition for cert. pending. In *Powell*, a marine terminal employee whose occupation for seven months had been unloading railroad cars at a shoreside grain

63. White was in fact an electrician rather than an operator or car handler, but his work appears to fit the type of maintenance work elsewhere held to be inherently a part of the cargo handling function.

elevator was held not to meet the maritime employment requirement. Again, the court was looking to the worker's non-maritime *employment* rather than to the maritime nature of the *cargo* being handled. This emphasis on employment is clearly the same emphasis used by the Congressional Committees in the last two sentences of their reports, as quoted above. The court below ignored this legislative explanation of the maritime employment concept, just as it ignored this Court's enumeration of the elements of a maritime occupation in *Caputo* when the present cases were remanded for reconsideration. The failure to give careful consideration to the Congressional intention and to the implications of an over-broad approach led the court below to the relatively easier, "liberal construction" approach which intrudes the federal compensation remedy into employer-employee relationships far beyond the shoreward extension actually considered by the Congress in 1972, as *Conti*, *White* and *Powell* graphically demonstrate.

A DEFINITIVE MARITIME EMPLOYMENT STATUS TEST

If the foregoing does nothing else, it demonstrates quite clearly that the Court should try to establish a definitive maritime employment status test—one that is simple and easy to apply uniformly throughout the country and that will resolve substantially all status questions at least as to break-bulk operations. Petitioners respectfully submit that as to break bulk cargo operations such as those involved in *Caputo*, *Ford*, and *Bryant*, such a maritime employment test can be simply stated:

On the date of his injury, was the employee subject to being assigned by his employer to perform any

part of his work on the navigable waters of the United States?⁶⁴

If this question is answered in the affirmative, he meets the status requirement, because he is "someone like *Caputo*," 432 U.S. at 273, who prior to the 1972 Amendments would have been covered by the Longshoremen's Act for only the part of his work which was on navigable waters and by a state workmen's compensation act for his work on the adjoining area shore. It was only to such an employee that Congress intended to provide a uniform compensation remedy under the Longshoremen's Act and thus eliminate having his compensation remedy, whether State or Federal, determined by the "fortuitous circumstance of whether the injury occurred on land or over water."⁶⁵

If this maritime employment status test is answered in the negative, he is not covered by the 1972 Amend-

64. This test is so simple and easy of uniform application that counsel has some concern that its simplicity may be an even bigger obstacle to its acceptance by the Court than the basic reluctance most courts seem to have to accept any such suggested test from counsel in a case. It could be phrased more in keeping with the language of *Caputo*, but with the same meaning, as follows:

On the day of his injury, was the employee subject to being assigned by his employer to work both on navigable waters and on an adjoining area ashore?

This language is suggested by this portion of the Court's opinion in *Caputo*:

"Thus, had *Caputo* avoided injury and completed loading the consignee's truck on the day of the accident, he then could have been assigned to unload a lighter. *Id.*, at 24. Since it is clear that he would have been covered while unloading such a vessel, to exclude him from the Act's coverage in the morning but include him in the afternoon would be to revitalize the shifting and fortuitous coverage that Congress intended to eliminate." 432 U.S. at 274.

65. S. Rep. 92-1125, p. 13; H. Rep. 92-1441, p. 10; 1972 U.S. Code Cong. and Administrative News, p. 4708.

ments and he still has the same uniform compensation system under state law after the 1972 Amendments as he had before them—a uniform system Congress did not intend to disturb.⁶⁶

This maritime employment status test not only conforms to the historical definition in the Court's prior cases as adopted by Congress in the last two sentences of the legislative history, it is also fully consistent with the principal criteria of *Caputo*. The Court held *Caputo* covered while engaged in the old-fashioned process of loading a truck for two reasons:

1. He was a member of a regular stevedoring gang and therefore a longshoremen by occupation, and
2. On the date of the injury he was subject to being assigned by his employer to work on the navigable waters as well as on an adjoining area ashore.

As we read *Caputo*, the fact that he was a regular longshoreman standing alone would not have carried the day for him; for example, if he were doing the purely clerical work expressly excluded from coverage in the Committee Reports and had not been subject to assignment to work aboard vessels on the date of his injury, he would not have been subject to the shifting and fortuitous coverage Congress intended to eliminate.

From what we have said previously, and the foregoing suggested maritime employment status test, it is obvious that Petitioners believe the most significant of

66. Please see discussion *infra* at n. 78, p. 44.

these two reasons is the one which made *Caputo* the type of amphibious worker for whom Congress desired to provide a uniform compensation system after the 1972 Amendments. It was the potential of being assigned to work both on a vessel and ashore on the date of his accident which exposed *Caputo* to the very evil which Congress intended to correct—walking in and out of coverage under the Longshoremen's Act in the course of his work day.

We suggest the Court reconsider the apparent significance which it attached to *Caputo*'s occupation as a longshoreman. We believe the facts of the *Ford* case graphically demonstrate the many problems posed by such a "longshoreman by occupation" criterion.⁶⁷ It is conceded that *Ford* was not a longshoreman by occupation even though during the year immediately prior to his injury on the railroad car, he had worked a total of seven days in loading and unloading vessels, and therefore would have been covered prior to the 1972 Amendments for those portions of his activities on those seven days while aboard a vessel upon navigable waters. Petitioners believe it is clear Congress intended for him to be covered by the 1972 Amendments while so engaged in such indisputably longshoring operations, whether his work in those long-

67. The stipulated facts show that *Ford* drove a beer truck during a part of the year immediately prior to his injury in addition to his work as a construction worker, as a longshoreman for seven days, and as a warehouseman for some 39 days. App. p. 17. If while driving the beer truck *Ford* had been required by his employer to pick up some beer being imported from Germany and to help a warehouseman in a pier-side warehouse to load the cases of beer onto his truck, he would have been the equivalent of the truck driver in *Caputo* and clearly would not have been covered under the Longshoremen's Act even if he had worked enough in indisputably longshoring operations in that same year to cause the Court to say he was a longshoreman by occupation.

shoring operations was performed on the vessel or on an adjoining area. He may be recognized as an "other person engaged in longshoring operations" on those seven days. 33 U.S.C. § 902(3). The fact that all of his work may have been performed on those seven days entirely ashore in an adjoining area, and none upon navigable waters aboard a vessel is of no significance—Congress intended for him to be covered while working ashore after the 1972 Amendments because he had the potential to walk in and out of the coverage of the Longshoremen's Act during the course of a day's work at the direction of his employer. On those days he was an "amphibious worker" for whom Congress desired to provide a uniform compensation system. If this potential assignment to work both on navigable waters and on an adjoining area is the basis for the maritime employment status test, it completely solves the jurisdictional problem insofar as all employees are concerned whether they are longshoremen by occupation like Caputo or not. If, however, the Court also recognizes a separate longshoreman by occupation test, rather than recognizing "longshoreman" as shorthand for "subject to assignment aboard ship," the problem of determining how many days or weeks or months a year an employee like Ford must work to meet this "longshoreman by occupation" criterion will require years of litigation to resolve.

The *Powell* case from the Ninth Circuit, presently pending on certiorari, further illustrates this problem.⁶⁸ Apparently Powell had been a longshoreman by occupation until he went to work at Cargill's grain elevator some seven months before his injury. For this seven

68. *Cargill, Inc. v. Powell*, 573 F.2d 561 (9th Cir. 1977), petition for cert. pending, No. 77-1543.

months, Powell "had no involvement whatsoever with the loading and unloading of the ships themselves," 573 F.2d at 564, and in fact could not have been such an amphibious worker for, like Bryant's situation here, all of this work was done by independent stevedoring companies and not Cargill. While he had not pursued his former occupation as a longshoreman for seven months, the Federal Respondent's Memorandum on the Petition for Certiorari in these cases asserts that Powell was still a longshoreman by occupation at the time he was hurt unloading a railroad car at the grain elevator.⁶⁹ How many more weeks or months would it be before he would no longer be considered a longshoreman by occupation by the Federal Respondent?

We do not believe the Court intended to hold that since Caputo was a longshoreman by occupation that this alone was sufficient to afford him coverage under the Longshoremen's Act at any time he was injured on a covered situs, nor we respectfully submit could it have done so in view of the legislative history. For example, assume that Caputo had started moonlighting at different jobs. Assume that one such job was as driver of a consignee's truck which required him to pick up cargo at the dock for further transshipment, and actively to help to load the consignee's truck as in the *Caputo* case. As the Court has recognized, the legislative history states categorically that such a truck driver is not intended to be covered by the extension of the Act's jurisdiction ashore in the 1972 Amendments. Thus, we submit, under those circumstances whether Caputo is a longshoreman

69. Memorandum for Federal Respondent in No. 77-1543, pp. 3-4.

by occupation and is moonlighting as a consignee's truck driver or whether he is a full time truck driver employee of the consignee, he would not be covered by the 1972 Amendments and Congress clearly so indicated in the legislative history.⁷⁰

We respectfully submit that the maritime employment status test which Congress intended to be applied, and which has been adopted at least in part by the Court in *Caputo* as to break bulk cargo operations is simply:

Whether the employee on the date of his injury is subject to being assigned by his employer to perform any part of his work on navigable waters?

If so, Congress wanted to provide him with a uniform compensation system—the same one that he had for only that part of his work which was done on navigable waters prior to the 1972 Amendments.

We respectfully submit that this is the only approach which gives full meaning to everything that Congress said both in the statute and in those portions of the Committee Reports dealing with the Extension of Coverage to Shoreside Areas.

70. While it may be unlikely that longshoremen like Caputo himself would have to moonlight, there are many workers with other full time occupations who moonlight as longshoremen at night and on weekends who could never meet the longshoreman by occupation criterion, yet they were clearly covered by the Longshoremen's Act while working on navigable waters prior to the 1972 Amendments and obviously Congress intended such moonlighting amphibious workers to be covered if injured ashore while engaged in longshoring operations after the 1972 Amendments. An employee's regular occupation is not the standard—it is rather his status as an amphibious worker who, prior to the 1972 Amendments, did not have a uniform compensation system while working on the waterfront, which non-uniformity Congress intended to correct by the 1972 Amendments.

WILL THE SUGGESTED MARITIME EMPLOYMENT STATUS TEST WORK OTHER THAN IN BREAK-BULK CARGO HANDLING ACTIVITIES?

As the Court correctly concluded in *Caputo*, modern cargo handling techniques such as containers were singled out by Congress for special treatment as to injuries ashore, because the loading and unloading of many break-bulk cargoes by longshoremen in the holds of vessels on navigable waters had been moved ashore and become the stuffing and stripping of containers, the "modern substitute for the hold[s] of the vessel." 432 U.S. at 270.

Leaving containers and other such modern cargo handling techniques aside,⁷¹ the maritime employment status test which Petitioners suggest will answer most, if not all, questions as to the maritime employment status

71. Petitioners believe this Court properly perceived the two dominant themes and purposes of the Congress in extending the Act's jurisdiction ashore, and particularly in recognizing that the considerations for the movement ashore as to modern cargo handling techniques such as containerization were completely different from those relating to break bulk cargo operations. As to containers, Congress intended to include the stuffing and stripping of containers ashore as this was the functional equivalent of the work done prior to this modern cargo handling technique by longshoremen upon the navigable waters of the United States. Thus, as this Court correctly perceived, Congress did not intend for shipowners or stevedoring companies to be able to avoid the more liberal compensation benefits of the Longshoremen's Act by the expediency of moving maritime employment activities from the vessel onto the dock by employing containers. The point of rest argument, as articulated by Petitioners in the court below and rejected by this Court in *Caputo*, 432 U.S. at 274-276, failed to recognize that persons "like Caputo" could work on either side of that point in the course of their employment. The standard of maritime employment for which reaffirmation is sought in the present case is not subject to that weakness, however, for by definition it provides a uniform remedy to all those otherwise covered by the Act for part of their activity.

of employees as readily as it answered the maritime employment status of employers prior to the 1972 Amendments.⁷²

A few specific examples of other types of employees who were covered for a part of their work activities prior to the 1972 Amendments and thus were subject to walking in and out of the coverage of the Longshoremen's Act during the course of a single work day will graphically illustrate the ease with which the suggested status test can be applied. In considering these examples, contrast the Director's proposed definition of maritime employment which is completely unworkable as to these employees as none involves the physical handling of cargo to or from land transportation:

1. Ship Chandlers or Ship Suppliers—men or women who go aboard vessels on the navigable waters of the United States to either sell or deliver ships' supplies or in some instances to sell or deliver clothing purchased by members of a vessel's crew.
2. Marine Surveyors—People who go aboard vessels and on the docks to inspect the condition of a vessel, before the loading or unloading of cargo, after cargo operations have been completed, or to ascertain the nature and extent of damages which may have been sustained by a vessel in collision or by cargo in the course of

72. The 45 years which the Court spent "trying to ascertain the respective spheres of coverage of the State and Federal systems," 432 U.S. at 259, did not really involve this question as to employers after this Court's decision in 1930 in *Noguiera*, 281 U.S. 128 (1930), discussed above at page 23. The problems involved related to employees and to the situs of injuries, rather than to the maritime employment requirement for employers.

its loading and/or unloading and/or transit by the vessel.

3. Ship Cleaners—particularly used in connection with vessels carrying petroleum products—are employed by companies specializing in the cleaning of tanks and/or other cargo compartments, whose employees must work both aboard a vessel and on the adjoining dock area.

If injured on a covered situs ashore or afloat, the simple maritime employment status test is quickly answered as to these waterfront employees in the affirmative—all are subject to being assigned to perform a part of their work on navigable waters. All are subject to the very evil Congress tried to eliminate—a shifting, fortuitous and non-uniform compensation system prior to the 1972 Amendments.⁷³

73. While not intended to be either exhaustive or exhausting, several other examples are:

1. Steamship Agents (like Bryant's employer here)—People who board vessels upon their arrival in port who are employed by the vessels' owners to perform whatever shoreside services might be needed other than longshoring, and to otherwise assist the Master of the vessel while it is in port.
2. Drivers of laundry trucks who pick up from vessels upon their arrival in port any laundry or cleaning of ships' linens or crews' clothing and effects, and thereafter return them aboard the vessel.
3. Line Handlers—People who assist a vessel in tying up to the dock by handling its mooring lines on the dock and/or on the water when it is necessary to reach mooring dolphins by small boats.
4. Fumigators—People employed to fumigate cargoes such as grain, a part of whose work requires them to be both aboard the vessel and on the adjoining dock area.
5. Marine Petroleum Inspectors—Men who are hired to ascertain the condition of a vessel's cargo tanks prior to loading, to sample the petroleum cargoes in both the shoreside tanks from which the cargo is loaded aboard the vessel or into which it is discharged from the vessel, and thereafter to certify the quality

In rejecting the point of rest theory in *Caputo*, the Court was not convinced it was a "workable definition" of maritime employment because the point of rest varies from port to port and with different types of cargo, and because the "point can be moved seaward or landward at the whim of the employer". 432 U.S. at 276 n. 38. Precisely the same problems exist with the Director's proposed definition. But whether an employee is subject to being assigned to work in part on navigable waters and in part ashore does not present such problems, as *Caputo*, *Ford* and *Bryant* demonstrate—maritime employment status follows from his being an amphibious worker, whatever his actual assignment at the moment of injury.

loaded aboard or discharged from the vessel by reference to information developed by them both at the storage tanks ashore and from the vessel's tanks themselves.

6. Gangway Guards—People employed to serve as gangway guards or gangway watchmen while a vessel is in port for security purposes, a part of whose duties are performed on the vessel and a part on the adjoining dock.
7. Marine Investigators and/or Insurance Adjusters—People who are engaged in investigating various marine casualties and damage claims both to the vessel, its cargo, its personnel and others who work aboard it, these people perform a part of their activities on the navigable waters of the United States and a part on adjoining areas.
8. Union Patrolmen or Representatives—Officials of various maritime labor unions representing not only masters, engineers and the unlicensed crew of vessels, but also longshoremen or ship builders or ship repairers, a part of whose duties are performed aboard vessels and a part on adjoining areas.
9. Last but not least, maritime attorneys whose work frequently requires them to board vessels to interview witnesses, obtain photographs of the vessel and the surrounding dock area, etc., in connection with all types of maritime claims which might be made against the vessel, the stevedore or others, a part of whose activities are upon the navigable waters of the United States and a part on the adjoining dock area.

DOES THE SUGGESTED MARITIME EMPLOYMENT STATUS TEST MEET THE COURT'S LIBERAL CONSTRUCTION DOCTRINE FOR REMEDIAL LEGISLATION?

Lead Counsel for Petitioners, having been on the brief on the losing side,⁷⁴ remembers all too well this Court's statement of this doctrine in *Voris v. Eikel*, 346 U.S. 328 (1953). However, this Court's *Voris v. Eikel* language is seriously distorted by the court below. Contrast the following statements:

This Court:

Voris v. Eikel, 346 U.S. at 333, "This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results."

Fifth Circuit:

Perdue, 539 F.2d at 541, Pet. p. 42, "In deciding each appeal, we must remember that the Act is to be liberally construed in favor of injured workers, * * *."

Voris v. Eikel dealt with the duties imposed by the Act on an illiterate, uninstructed employee clearly included within its coverage and held that a technical notice requirement should not bar the claim where the employer had constructive if not actual knowledge of the employee's injury. In the present cases the court below was dealing with the choice between two remedies, state or federal, with the question being the degree of expansion of the

74. Counsel cannot refrain from noting that at least two of the attorneys involved in that case on opposite sides went on to substantially better things with the winner still on top: on the brief for the winning side was "Assistant Attorney General Warren E. Burger," and arguing the cause on the losing side was "John R. Brown, of Houston, Texas" whom the Court will recognize as the present Chief Judge of the Court of Appeals for the Fifth Circuit.

federal coverage or jurisdiction. Considering that federal jurisdiction is by definition limited rather than plenary, the distinction between the issue in the present cases and that in *Voris v. Eikel* is readily apparent. This Court's admonition in favor of liberal construction in conformance with the Act's purpose does not mandate a broad expansion of federal jurisdiction. Both Administrative Law Judges below recognize this Court's maxim, but both found that liberal construction principles should not be employed in furtherance of federal expansionism and in frustration of the Congressional purpose. *Ford*, App. p. 39; *Bryant*, App. p. 91.

The Fifth Circuit's distorted version of the liberal construction maxim is in the context of these jurisdiction cases an uncertain tool. If in a given case state coverage would be more beneficial to the claimant, the Fifth Circuit approach would then restrict federal jurisdiction.⁷⁵ In the context of Longshoremen's Act jurisdiction, this Court has rejected the concept of attempting to maximize or minimize the jurisdiction criterion, for the reason that the resulting uncertainty is inconsistent with the Congressional purpose. *Calbeck v. Travellers Insurance Co.*, 370 U.S. 114, 125-126 (1962). The Fifth Circuit's maximization of liberality is equally uncertain as a jurisdictional criterion and should be rejected as an obvious distortion of this Court's principle of liberal construction. *Voris v. Eikel*, *supra*.

Petitioners' suggested maritime employment status test clearly meets this doctrine—it conforms fully with the Congressional purpose in a way which avoids harsh and

75. E.g., if state benefits exceeded the federal maximum, 33 U.S.C. § 906, or if beneficiaries exist under a State Act who could not qualify under the Longshoremen's Act.

incongruous results. How? First, it provides the Longshoremen's Act as the uniform compensation remedy for those workers who prior to the 1972 Amendments were covered by it only for that part of their work activity on navigable waters, and by a state act for their work activity on land (workers like Caputo). And second, it leaves completely undisturbed the uniform compensation remedy provided by state law for those whose work activity is solely on land (workers like Ford and Bryant). This is precisely the specific evil which Congress sought to eliminate, and a statute should not be construed to extend beyond the mischief it was intended to remedy.⁷⁶

There is nothing in the Amendments or the legislative history from which it can be reasonably implied that Congress intended to extend the Act's jurisdiction as the Director proposes—to cover all workers physically handling potential maritime cargo on an adjoining area.⁷⁷

76. 2A Sutherland, STATUTORY CONSTRUCTION, § 54.04 (4th Ed. 1973). In *United States v. Champlin Refining Co.*, 341 U.S. 290, 297 (1951), the Court applied this principle of looking to the mischief intended to be cured in declining the application of a broadly worded federal statute beyond the purpose for which it was intended. As noted in *Caputo*, 432 U.S. at 272, Congress set out to solve a uniformity problem. No such uniformity problem existed in 1972, and none exists now, as to persons such as Ford and Bryant.

77. Petitioners' suggested status test also serves to minimize the conflict and/or overlap of federal and state compensation remedies, while the Director's cover-the-waterfront approach maximizes it. For discussion of some of the problems this Director's maximization creates, such as exclusive v. concurrent jurisdiction, and if concurrent jurisdiction is the answer, those relating to *res judicata*, collateral estoppel, election of remedies, the full faith and credit clause of the Constitution, etc., see the already conflicting decisions from the Court of Appeals for the Fourth Circuit in *Pettus v. American Airlines, Inc.*, ____ F.2d____ (September 26, 1978) and *Newport News Shipbuilding & Dry Dock Company v. Director, Office of Workers' Compensation Programs*, 583 F.2d 1273 (September 21, 1978).

While Congress was obviously upset and displeased, and rightfully so, at the disparity in benefits between the various state and federal acts, it recognized that extending the Longshoremen's Act ashore was not the proper way to correct this evil on an overall basis. How? By specifically excluding from the jurisdictional extension in the legislative history (1) various waterfront employees (i.e., transshipment workers like the truck driver in Caputo, checkers not "directly involved in the loading or unloading" of vessels and "individual[s] employed by a person none of whose employees work, in whole or in part, on navigable waters") and (2) various waterfront employers (those employers none of whose workers work, in whole or in part, on navigable waters).

That the Congressional purpose did not include correction of this overall evil is further demonstrated by the fact that the principal sponsors of the 1972 Amendments, Senator Williams of New Jersey and Senator Javits of New York, had waiting in the wings specific legislation to correct this overall evil, not just on the waterfront, but throughout the entire country. In the very next year of 1973, the Senators introduced legislation entitled the National Workers' Compensation Standards Act of 1973 to establish national minimum standards of compensation benefits with which a state would be compelled to comply throughout the entire state and not just on their water fronts. S.2008, 93d Congress, 1st Session, Cong. Rec. p. S11285.⁷⁸

Petitioners respectfully submit that their suggested maritime employment status test is as liberal an interpreta-

78. Successor bills have been introduced in subsequent sessions, with the most recent bills being S. 3060, 95th Congress, 2d Session, introduced on May 11, 1978 in the Senate and H. Rep. 2058, 95th Congress, 2d Session, in the House of Representatives.

tion of the 1972 Amendments as the Congressional purpose will permit. In contrast, the Director's cover the waterfront approach requires not just a liberal construction of the Act, but a judicial amendment to cover those waterfront employees who had before the 1972 Amendments, and who still have, a uniform compensation remedy for all of their work activities ashore.

THE STATUTORY PRESUMPTION OF COVERAGE

The court below considered that it was "bound by a statutory presumption that an individual claim comes within the Act's coverage. 33 U.S.C. § 920(a)." 539 F.2d at 541, Pet. pp. 42-43. In fact, the statutory language is as follows:

"In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

* * *", 33 U.S.C. § 920.

This Court has specifically treated the presumption section of the Longshoremen's Act in the context of a fact-finder's ruling that a claim was not compensable. In *DelVecchio v. Bowers*, 296 U.S. 280 (1935), the Court wrote with respect to the provision of Section 920 pertaining to suicide, 33 U.S.C. § 920(d), which is a parallel provision to the coverage language quoted above, 33 U.S.C. § 920(a). Both depend on the unlettered introductory portion of the section. This Court held that the only purpose of the presumption is "to

control the result when there is an entire lack of competent evidence," 296 U.S. at 286, and that when evidence is submitted, "the presumption falls out of the case." *Id.*⁷⁹ In the present cases both Administrative Law Judges specifically found the presence of substantial evidence, *Ford*, App. p. 39, *Bryant*, App. p. 91, and no suggestion has ever been raised that all facts of the individual Respondents' employment were not before the Administrative Law Judges at the time of their decisions. In this situation the statement of the Court of Appeals that it was "bound" by the statutory presumption of coverage is absolutely erroneous and taints its entire opinion, particularly the treatment of the *Bryant* case where the presumption is explicitly relied upon. Pet. p. 49. The Court should therefore reaffirm *DelVecchio* as to the proper consideration to be given to the statutory presumptions.

NO SPECIAL DEFERENCE IS OWED TO THE BENEFITS REVIEW BOARD IN THESE CASES

Over the years this Court has developed a significant body of law pertaining to judicial review of federal administrative action. Various guidelines have evolved according to whether the issue is a question of law (within the particular and non-delegable competence of a court) or a matter for agency discretion (committed by Congress

79. "The statement in the act that the evidence to overcome the effect of the presumption must be substantial adds nothing to the well understood principle that a finding must be supported by evidence. Once the employer has carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in the claimant's favor. Its only office is to control the result where there is an entire lack of competent evidence." 296 U.S. at 286 (footnotes omitted).

to the expertise of the executive agency). The difficulty is in knowing how to classify the question (legal or discretionary?). DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* (1976) pp. 688-693.

In the present cases, the court below has classified the question of the jurisdictional coverage of the Act as a matter committed to agency discretion not subject to judicial review for correctness but bound to be affirmed if capable of legal rationalization. 539 F.2d at 541, Pet. p. 43. Two other Circuit Courts of Appeals have expressly rejected this approach to post-1972 jurisdiction questions, however, finding that the Benefits Review Board⁸⁰ is more of an umpiring rather than discretionary agency and that in any event, the present issue of statutory construction is a legal issue properly given plenary scrutiny by the reviewing court.⁸¹

The cases relied on by the court below do not support its deference to the Benefits Review Board in the present context. Both are pre-Amendment cases⁸² which decline to overturn fact findings and inferences of the Deputy Commissioners of Labor, who provided initial adminis-

80. The Benefits Review Board was created by the 1972 Amendments, 33 U.S.C. § 921(b)(1), for the purpose of hearing appeals under the Longshoremen's Act. 33 U.S.C. § 921(b)(3). It has currently been designated to hear similar appeals under numerous other statutes.

81. *Stockman v. John T. Clark & Son of Boston*, 539 F.2d 264, 269 (1st Cir. 1976), cert. denied, 433 U.S. 908 (1977); *Pittston Stevedoring Company v. Dellventura*, 544 F.2d 35, 47 (2d Cir. 1976), *aff'd sub nom. Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977).

82. 539 F.2d at 541, Pet. p. 43, as follows:

"See *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508, 71 S.Ct. 470, 95 L.Ed. 483 (1951); *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 478-79, 67 S.Ct. 801, 91 L.Ed. 1028 (1947)."

trative adjudication under the pre-Amendment procedure. In 1972, the functions of the Deputy Commissioners with respect to adjudication were transferred to Administrative Law Judges. 33 U.S.C. § 919(d). In both of the claims presently before this Court, the respective Administrative Law Judges made fact findings based on the stipulations of the parties and drew the conclusions that the claimants were not in maritime employment. If *Cardillo* and *Brown-Pacific-Maxon* were applicable to these cases, the limited review principle should be applied to the findings of no jurisdiction. In this regard, note that the Board's review is specifically limited by the substantial evidence rule. 33 U.S.C. § 921(b). While Petitioners believe, with the First and Second Circuits, that the question of shoreside jurisdiction is a legal issue requiring judicial analysis, the court below not only deferred to the executive agency and limited its review of that agency's action, but also chose the opinion of the Benefits Review Board to defer to rather than the opinion of the Administrative Law Judges. In view of the assumption by the Administrative Law Judges of the adjudicatory responsibilities of the Deputy Commissioners, what then is the function of the Benefits Review Board?

Clearly, the Board has an appellate function. 33 U.S.C. § 921(b). As noted by Judge Friendly, the Board's function is that of an umpire, but only in an appellate context, for the Board's review is specifically limited by a substantial evidence standard. *Dellaventura, supra*, 544 F.2d at 49. The Board in theory provides a nationwide coherence to the administration of the several Acts whose claims it reviews, but on a question of statutory construction such as the current cases present,⁸³ there is no

83. *Stockman, supra*, n. 81, 539 F.2d at 270.

expertise in the Board superior to that of the federal courts. Perhaps the best demonstration of the error of deferring to the Board in these jurisdiction cases is this Court's treatment of the jurisdiction issues in *Caputo*. In that case the Court of Appeals for the Second Circuit had specifically considered and rejected the judicial deference approach to review of the Board's decisions. This Court did not hesitate to review in detail the jurisdictional, statutory interpretation questions presented in *Caputo*, even though the judicial deference approach was clearly in the case below. The Court should reject the holding of the court below that it must defer to the Board on jurisdictional issues.

CONCLUSION

In view of the fact that claimant Ford and claimant Bryant were not engaged in maritime employment, either by occupation or as amphibious workers on the day of their injuries, Petitioners respectfully pray that the Court reverse the decisions of the court below and hold that these claims are not covered by the Longshoremen's Act as amended in 1972.

Respectfully submitted,

E. D. VICKERY
W. ROBINS BRICE
3710 One Shell Plaza
Houston, Texas 77002
713/224-8380
Attorneys for Petitioners

Of Counsel:

ROYSTON, RAYZOR,
VICKERY & WILLIAMS
Houston, Texas

FEB 9 1979

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

NO. 78-425

P. C. PFEIFFER CO., INC., and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENT, WILL BRYANT

ARTHUR L. SCHECHTER
Two Shell Plaza, Suite 2080
Houston, Texas 77002

Of Counsel: *Attorney for Will Bryant,*
SCHECHTER & SHELTON, INC. *Respondent*

SUBJECT INDEX

	Page
OPINIONS BELOW	1
STATUTE INVOLVED	2
REVIEW OF THE FACTS OF THIS CASE	3
QUESTION PRESENTED	5
ARGUMENT	5
I. INTRODUCTION	5
II. A DEFINITIVE MARITIME EMPLOYMENT TEST AS PROPOSED BY THE RESPONDENT	6
III. BRYANT IN LIGHT OF CAPUTO	8
IV. THE COURTS SHOULD DEFER TO ADMINIS- TRATIVE INTERPRETATIONS OF THE ACT	13
CONCLUSION	14

LIST OF AUTHORITIES

CASES	Page
Alabama Dry Dock & Shipbuilding Co. v. Kininess and the Director, Office of Workmen's Compensation Programs, United States Department of Labor, 554 F.2d 176	9
Calbeck v. A.D. Suderman Stevedoring Co., 290 F.2d 308 (5th Cir. 1961)	13
Cardillo v. Liberty Mutual Insurance Co., 330 U.S. at 474	14
Davis v. Department of Labor, 317 U.S. at 256	14
Luckenbach SS Company v. Norton, 106 F.2d 138 (3rd Cir.)	13
Nacirima Operating Company v. Johnson, 396 U.S. 212, 90 S.Ct. 347, 24 L.Ed.2d 271	6
Nalco Chemical Corp. v. Shea, 419 F.2d 572 (5th Cir. 1969)	13
Nogueria v. New York, N.H. and H.R. Co., 281 U.S. 128	7
Northeast Marine Terminal Company, Inc. v. Caputo, 432 U.S. 249 (1977). Court's Order of Remand at 433 U.S. 904 (1977)	2, 8, 9, 10, 11, 13

CASES	Page
O'Keefe v. Smith, Hinchman & Grylls Assoc., 380 U.S. at 362	14
O'Leary v. Brown Pacific-Maxon, Inc., 340 U.S. 504	14
Pennsylvania Railroad Co. v. O'Rourke, 344 U.S. 334	7
Perdue v. Jacksonville Shipyards, Inc., 539 F.2d 533 (1976)	2
Reed v. The Steamship Yaka, 373 U.S. 410 (1963), rehrg. den. 375 U.S. 872 (1963)	13
Sea-Land Services, Inc. v. Johns, 540 F.2d 629 (3rd Cir. 1976)	9
Southern Pacific v. Jensen, 244 U.S. 205	11
State Industrial Commission v. Nordenholt, 259 U.S. 203 (1922)	7
Texport Stevedore Co. v. Winchester, 554 F.2d 245 (1977)	9
Voris v. Eikel, 346 U.S. 328, 74 S.Ct. 88, 98 L.Ed. 5	13
UNITED STATES STATUTES	
33 U.S.C. § 902(3)	2, 5, 6, 11, 12
33 U.S.C. § 902(4)	3
33 U.S.C. § 903(a)	3
33 U.S.C. § 920(a)	13
MISCELLANEOUS	
Benefits Review Board, 2 BRBS 408	2
H. R. Report No. 92-1441, 92nd Congress, 2nd Session 10-11 (1972)	8
Senate Rep. No. 92-1125, 92nd Congress	8

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-425

P. C. PFEIFFER CO., INC., and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENT, WILL BRYANT

OPINIONS BELOW

This case arises under the 1972 Amendments to the Longshoremen's and Harbor Workers' Act. It is before the Court for the second time.

The case originated in the administrative tribunals within the Department of Labor established by the Act. The Administrative Law Judge found no federal jurisdiction, but was reversed by the Benefits Review Board, 2 BRBS 408, reprinted as Appendix 10, pages 93-98.

This decision was affirmed in a single opinion by the Court of Appeals for the Fifth Circuit, reported sub nom *Perdue v. Jacksonville Shipyards, Inc.*, 539 F.2d 533 (1976). This Court vacated the judgment based on that 1976 opinion and remanded the case to the Court of Appeals for the Fifth Circuit for reconsideration in light of the Court's opinion in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977). The Court's Order of Remand is reported at 433 U.S. 904 (1977).

After remand, the Court of Appeals reaffirmed its earlier decision based on its prior opinion cited above. The Court's brief opinion reaffirming its prior decision is reported at 575 F.2d 79 (5th Cir. 1978).

This Court again granted certiorari on November 27, 1978.

STATUTE INVOLVED

The relevant portions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, are as follows:

Section 2(3), 86 Stat. 1251, 33 U.S.C. § 902(3):

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder and shipbreaker, but such term does not

include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 2(4), 86 Stat. 1251, 33 U.S.C. § 902(4):

The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Section 3(a), 86 Stat. 1251, 1265, 33 U.S.C. § 903(a):

Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel.)

REVIEW OF THE FACTS OF THIS CASE

Respondent, WILL BRYANT, sustained injury while working in a warehouse at Pier 23 in the Port of Galveston, Texas, adjoining the navigable waters of the United States. (Appendix, page 47).

In the Port of Galveston, cotton is received by various shoreside compress warehouses from inland shippers of

cotton. The cotton is then drayed by trailers to the pier warehouses where it is removed and shipped out on navigable waters (Appendix, page 47).

At the time of this accident, Mr. Bryant, who was working out of International Longshoremen's Association Local 1308, was rolling a bale along a special purpose cotton dray wagon to the edge of the wagon to tip it over and head it off the wagon in the waterside warehouse (Appendix, page 47).

Though cotton is often taken for loading aboard vessels from the pierside warehouses, as it was on this occasion, it is sometimes directly taken from the shoreside transportation by longshoremen if the vessel on which it is to be shipped is waiting to be loaded (Appendix, page 58). The pier facilities are thus constructed to allow direct transfer from a dray wagon such as that involved in the occurrence in question to shipboard. The actual transfer would be made by deepwater longshoremen. Mr. Bryant, however, would never be required to go aboard ocean-going vessels, though much of his work (as it was on the day in question) was performed adjacent thereto (Appendix, page 51).

When bales of cotton are placed in the warehouse to await the arrival of the ship on which they will be loaded, they are separated and stored in individual lots for shipment and not in an unsegregated mass (Appendix, page 59).

At the time and on the occasion in question, WILL BRYANT'S employer, AYERS STEAMSHIP CO., INC., operated a steamship agency and terminal operation. It had in performing its steamship agency functions, employees who necessarily boarded ocean-going vessels and

performed portions of their duties on the navigable waters of the United States. (Appendix, page 50) In its capacity as a terminal operator it, additionally, received cargo for eventual loading aboard vessels. The cargo was stored in its pierside warehouses until space aboard vessels was ready to receive it or until longshore labor was available to load the cargo. (Appendix, page 50) The cotton on which Bryant was working at the time of his accident was loaded on May 7, 1973, onboard the vessel "KOREAN EXPORTER." (Appendix, page 50)

QUESTION PRESENTED

Whether the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, was intended to cover an employee, who is injured while working in the movement of maritime cargo toward shipboard at a covered situs when that worker is not subject to assignment aboard a vessel.¹

ARGUMENT

I.

INTRODUCTION

It is urged that Congress intended that all handlers of maritime cargo between land and water transportation, within or on a covered situs be embraced by the humanitarian expansion of the Act.

Section 902(3), Title 33 U.S.C. is expansive and provides coverage to all workers on a covered situs who are engaged in "maritime employment".

1. The Petitioner has acknowledged that the situs requirements of the Act have been met (Petitioners' Brief, page 7, note 11.)

In this case, the fact that the Respondent, Will Bryant, was working at a covered area situs is not contested. Accordingly, the only issue is whether or not Mr. Bryant's work was part of the "maritime employment" Congress intended to protect, and whether or not he was an employee within the meaning of Section 902(3) of the Act.

II.

A DEFINITIVE MARITIME EMPLOYMENT TEST AS PROPOSED BY THE RESPONDENT

The Respondent, Will Bryant, agrees with Petitioner that a definitive test of maritime employment is essential to the administration of the Act. However, the test propounded by Petitioners is restrictive, unworkable and would defeat the intent of Congress.

A definitive test, for those employees working in the overall loading and unloading of vessels would be:

"Whether the injury was sustained while moving or handling maritime cargo between land transportation and water transportation upon a situs covered under Section 3a (33 U.S.C. § 903a) of the Act".

Prior to the 1972 amendments the coverage under the Act was almost exclusively situs oriented: workers on the landward side of the shoreline were not covered; those on the waterside were. Even longshoremen who were injured on a pier permanently affixed to shore were not covered, despite the fact that their function at the time was to assist in the loading and unloading of vessels. *Nacirima Operating Company v. Johnson*, 396 U.S. 212, 90 S.Ct. 347, 24 L.Ed.2d 271.

Petitioners make much in their briefs of cases decided by this Court prior to the 1972 amendments (e.g., *Pennsylvania Railroad Co. v. O'Rourke*, 344 U.S. 334 (discussed at p. 23 of Petitioners' brief); *State Industrial Commission v. Nordenholt*, 259 U.S. 203 (1922), discussed at p. 21 of Petitioners' brief); and *Nogueria v. New York, N.H. and H.R. Co.*, 281 U.S. 128 (discussed on p. 24 of Petitioners' brief). Yet all of these cases turned on situs only. If the occurrence took place on the navigable waters of the United States, it was maritime in nature; if not, it was not. This was true regardless of the function being performed by the injured claimant.

In the 1972 amendments, Congress expanded the limited pre-amendment definition of situs by adding the language "including any adjoining pier, wharf, dry dock, terminal, building way, marine railroad, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel".

In adding this language, the pre-amendment cases turning on situs were effectively rendered irrelevant. Before the 1972 amendments, as the whole test was one of situs, "maritime employment" was defined in the context of where the occurrence took place with little or no judicial note being made of the nature of the task performed.

The addition in 1972, was that the status of the injured worker would have to be tested by what he was doing—whether the work maritime in nature—if the work was performed on a covered situs.

Congress did not intend to limit its definition of maritime employment to only those workers who were actually

loading or unloading a vessel. The legislative intent is clearly more expansive. The Committee reports (H. R. Report No. 92-1441, 92nd Congress, 2nd Session 10-11 (1972)); Senate Report No. 92-1125, 92nd Congress acknowledges that "with the advent of modern cargo handling techniques, such as containerization and the use of L. A. S. H. type vessels, more of a longshoreman's work will be performed on land than heretofore".

This impression that all workers who participate directly or indirectly in the handling of maritime cargo is enforced even more strongly by the congressional observation that "checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment".

III.

BRYANT IN LIGHT OF CAPUTO

It is urged that at the time Mr. Bryant sustained injury, he was performing work which was as integral a part of the loading or unloading operation of a vessel as that done by Mr. Caputo or Mr. Blundo in *Northeast Terminal Company v. Caputo*, 97 S.Ct. 2348, 432 U.S. 249 (1977).

The work of Respondent Will Bryant within the confines of the water's-edge warehouse was just as essential to the seaward movement of the cargo into the holds of oceangoing vessels as was the work of deepwater longshoremen who transported it from the water's edge into the hold of the vessel. The cargo moved into the storage area was destined for shipment aboard oceangoing vessels. The cotton involved herein was, in fact, shipped a few

days after the occurrence. The functional relationship of the employee's activity to maritime commerce is the key under *Caputo, supra*. The line Congress intended to draw is not an arbitrary one, but distinguishes between maritime commerce and shore-based commerce. *Sea-Land Services, Inc. v. Johns*, 540 F.2d 629 (3d Cir. 1976).

The Fifth Circuit has similarly espoused this Congressionally intended broad view of coverage. *Alabama Dry Dock & Shipbuilding Co. v. Kininess and the Director, Office of Workmen's Compensation Programs, United States Department of Labor*, 554 F.2d 176; *Texport Stevedore Co. v. Winchester*, 554 F.2d 245 (1977).

Mr. Bryant's connection to the working of cargo was every bit as related to maritime commerce as was Mr. Caputo's. Mr. Bryant was working in an area covered by the Statute, performing labor which resulted ultimately in the more convenient handling of cargo loaded aboard seagoing vessels. Therefore, he was directly involved in the movement of maritime commerce. His work, as strongly as Mr. Caputo's, was performed in the cargo handling operation between the cargo's land transportation and sea transportation.

If any expansion of what Mr. Justice Marshall noted as being a "minimum" for coverage in *Caputo, supra*, is necessary, it is very little.

Mr. Bryant was engaged at the time of injury in placing the bale of cotton into a specific place as part of a specific lot for shipment. If this lot had been containerized, and Mr. Bryant had been rolling the injury-causing bale into a container for subsequent loading, there

would be no doubt as to coverage in light of *Caputo, supra*.

Any delay between the placing of this bale of cotton in the segregated area with the lot with which it was to be shipped, and the date of its subsequent loading, has no significance in light of *Caputo, supra*, at page 274, note 37, wherein the Court noted that:

“ . . . the consignee's delay in picking up the cargo has no effect on the character of the work required to effectuate the transfer of the cargo to the consignee. The work performed by the longshoreman is the same whether performed the day the cargo arrives in port or weeks later.”

The unloading of the cargo by Mr. Bryant was the first part of a two-part loading process of the cargo aboard the vessel. To bifurcate this two-part movement and to allow one laborer to be covered and another, whose work is equally important to the movement of maritime commerce in a covered pierside area, to be left uncovered would result in the sort of bifurcation that both Congress and this Court in *Caputo* found so distasteful in the interpretation of the intent of the Act.

Petitioner has correctly pointed out the need for a definitive maritime employment test and has suggested that the test be whether:

“On the date of his injury, was the employee subject to being assigned by his employer to perform any part of his work on the navigable waters of the United States?” (Petitioner's brief, page 31)

In some cases it is possible that this might be evidentiary of a worker performing a maritime function so

as to entitle him to coverage as in *Caputo, supra*. Yet to make this limited test of whether a worker is in maritime employment would defeat congressional intent.

As this Court noted in *Caputo, supra*, at page 2359, “the language of the amendments is broad and suggests that we 'should take an expansive view of the extended coverage' ”.

Section 903a, expansively and clearly defines a covered employee as “any person engaged in maritime employment”. If Congress had intended to limit the definition of such employees to the narrow group to whom coverage would be granted under the test proposed by Petitioner, Congress would have so stated. Nothing in the Act indicates that Congress intended to limit the scope of this remedial and humanitarian legislation so severely.

What Congress intended was that coverage extend to anyone when engaged in the overall act of loading or unloading a vessel.

The test suggested by Petitioner of maritime employment, again turns toward “situs” as the primary test. Clearly Congress intends for the test to be one of function. Section 2(3) of the Act makes this premise clear.

Further, this test again seeks to introduce the line set out in *Southern Pacific v. Jensen*, 244 U.S. 205, into consideration. Congress clearly intended to abolish this sort of arbitrary line by its 1972 Amendments.

This Court in *Caputo, supra*, has already noted the Congressional intent of Section 902(3) that the test should be whether the worker was performing a task which was “an integral part of the unloading process.”

Further, the fact that Petitioner's suggested test can result in some of the very kinds of bifurcated coverage Congress was trying to correct.²

There are, undoubtedly, numerous examples of this sort of loading and unloading operations in different ports with which respondent is simply not familiar.

Petitioner urges that its test would expand coverage to include many various occupations, including maritime investigators and lawyers, ship's chandlers, etc. Respondent has great doubt as to whether Congress intended maritime lawyers or employees of that genre to be covered in its definition of "employee" in § 902(3). In fact, if anything, one could infer from the legislative history that Congress regarded maritime lawyers as being fairly dispensable!

Nonetheless, the Court in this case, need only define the extent to which the term maritime employment be extended to the overall operation of loading and unloading vessels. Other functions, maritime or quasi-maritime

2. For example, in the port of Galveston, there is a specific wharf area where bananas are unloaded. The gang, all hired out of the same union hall, are divided into two groups on a given day. One group goes aboard vessels to rig and work cargo and the other group works on the wharf all day unloading boxes from a conveyor belt (which is rigged into the vessel from the wharf) and further loading them onto trucks. These roles can and are changed on a daily basis, but the men with the higher seniority generally prefer to do the work of "truck riggers" as opposed to "boat riggers", and will not be on the vessel or on "navigable water" at any time of a given day. Yet the next day, the roles can be reversed. This is true despite the fact that the men hire out of the same hall, and are all participating in a direct continual (by conveyor belt) operation of unloading the cargo in a statute-covered situs. Yet, those who are selected as boat riggers on a given day would be uncovered by Petitioner's test.

should be otherwise tested, i.e., as a harbor worker, ship's repairman, etc.

Further, any ambiguity in the statute further should be liberally construed.

The Longshoremen and Harbor Workers' Compensation Act as amended, being remedial in nature, should be liberally construed in light of its humanitarian purpose. *Voris v. Eikel*, 346 U.S. 328, 74 S.Ct. 88, 98 L.Ed. 5; *Northeast Marine Terminal Co. v. Caputo*, 97 S.Ct. 2348, at p. 2359. *Reed v. The Steamship Yaka*, 373 U.S. 410 (1963), rehearing denied, 375 U.S. 872 (1963); *Nalco Chemical Corporation v. Shea*, 419 F.2d 572 (5th Cir. 1969); *Calbeck v. A.D. Suderman Stevedoring Co.*, 290 F.2d 308 (5th Cir. 1961).

A narrow construction of the Longshoremen's and Harbor Workers' Compensation Act has been, traditionally, disfavored. *Luckenbach SS Co. v. Norton*, 106 F.2d 138 (3rd Cir.).

IV.

THE COURTS SHOULD DEFER TO ADMINISTRATIVE INTERPRETATIONS OF THE ACT

It cannot be overlooked that Congress has established a statutory presumption that claims come within the act. Section 20(a), 33 U.S.C. 920(a).

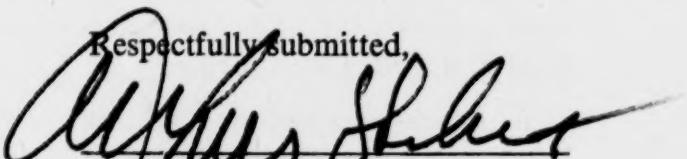
Further, the Benefits Review Board, as the agency charged with administration of the Act, should be accorded great judicial deference and their decisions set aside only on a showing of the clearest abuse of discretion. *O'Leary v. Brown Pacific-Maxon, Inc.*, 340 U.S. 504;

Cardillo v. Liberty Mutual Insurance Co., 330 U.S. at 474; *Davis v. Department of Labor*, 317 U.S. at 256; *O'Keefe v. Smith, Hinchman & Grylls Associates*, 380 U.S. at 362.

Here there is certainly a reasonable legal basis for the award to the Respondent, WILL BRYANT, and it should be sustained.

CONCLUSION

It is prayed that the Judgments below be in all things affirmed.

Respectfully submitted,


ARTHUR L. SCHECHTER
Two Shell Plaza, Suite 2080
Houston, Texas 77002

*Attorney for Will Bryant,
Respondent*

Of Counsel:

SCHECHTER & SHELTON, INC.

Supreme Court, U. S.

FILED

FEB 27 1979

No. 78-425

JOSEPH ROGAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

P. C. PFEIFFER COMPANY, INC. AND
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
PETITIONERS

v.

DIVERSON FORD AND DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR

AYERS STEAMSHIP COMPANY AND
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
PETITIONERS

v.

WILL BRYANT AND DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

CARIN ANN CLAUSS
Solicitor of Labor

WADE H. MCCREE, JR.
Solicitor General

LAURIE M. STREETER
Associate Solicitor

WILLIAM C. BRYSON
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530

GEORGE M. LILLY
JOSHUA T. GILLELAN, II
Attorneys
Department of Labor
Washington, D.C. 20210

INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statute involved	3
Statement	3
Summary of argument	12
Argument	14
A person employed in a marine terminal is engaged in "maritime employment" whenever he is performing tasks necessary to transfer cargo between land and water transportation	14
A. Any person who engages in "maritime employment" is an "employee" under the Act	14
B. The Board and the Director consist- ently have defined "maritime employ- ment" to include all employees en- gaged in handling cargo on the water- front	19
C. This Court's analysis in <i>Caputo</i> sup- ports a broad construction of the term "maritime employment"	23
D. Petitioners' proposed test for coverage is inconsistent with the purposes of the statute and the Court's analysis in <i>Caputo</i>	28
E. Any ambiguity in the statute should be resolved in favor of coverage	34

	Page
Argument—Continued	
1. The Act is a remedial statute and should be liberally construed	34
2. The Court should defer to the con- sistent administrative interpreta- tion of the Act	35
Conclusion	37

CITATIONS

Cases:	
<i>Avena v. Pittston Stevedoring Corp.</i> , 4 B.R.B.S. 556	20
<i>Avvento v. Hellenic Lines Ltd.</i> , 1 B.R.B.S. 174	19
<i>Board of Governors v. First Lincolnwood Corp.</i> , No. 77-832 (Dec. 11, 1978)	36
<i>Cabrera v. Maher Terminals, Inc.</i> , 3 B.R.B.S. 239, affirmed, 547 F.2d 1162, vacated and remanded, 433 U.S. 905, reaffirmed on remand, 564 F.2d 90	20, 28
<i>Calbeck v. Travelers Insurance Co.</i> , 370 U.S. 114	34
<i>Cardillo v. Liberty Mutual Insurance Co.</i> , 330 U.S. 469	35, 37
<i>Cargill, Inc. v. Powell</i> , 573 F.2d 561, peti- tion for cert. pending, No. 77-1543	20
<i>Coppolino v. I.T.O. Corp.</i> , 1 B.R.B.S. 205..	19
<i>Davis v. Department of Labor</i> , 317 U.S. 249	35
<i>De Bardeleben Coal Corp. v. Henderson</i> , 142 F.2d 481	34
<i>Dellaventura v. Pittston Stevedoring Co.</i> , 2 B.R.B.S. 340, affirmed, 544 F.2d 35, affirmed <i>sub nom. Northeast Marine Terminal Co. v. Caputo</i> , 432 U.S. 249..	19-20

	Page
Cases—Continued:	
<i>Director, Office of Workers' Compensation Programs v. Jacksonville Shipyards, Inc.</i> , 433 U.S. 904	11
<i>Director, Office of Workers' Compensation Programs v. O'Keefe</i> , 545 F.2d 337	37
<i>Fanelli v. Universal Terminal & Steve- doring Corp.</i> , 6 B.R.B.S. 51	20
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424..	35
<i>Humphrey v. International Longshore- men's Association</i> , 401 F. Supp. 1401, reversed on other grounds, 548 F.2d 494	23
<i>International Brotherhood of Teamsters v. Daniel</i> , No. 77-753 (Jan. 16, 1979)..	36
<i>International Container Transport Corp. v. New York Shipping Association</i> , 426 F.2d 884	22
<i>I.T.O. Corp. v. Benefits Review Board</i> , 563 F.2d 646	20
<i>Makoc v. Universal Terminal & Steve- doring Corp.</i> , 5 B.R.B.S. 3	20
<i>Mildenberger v. Cargill, Inc.</i> , 2 B.R.B.S. 51	28
<i>Nacirema Operating Co. v. Johnson</i> , 396 U.S. 212	16
<i>NLRB v. Iron Workers Local 103</i> , 434 U.S. 335	36
<i>Nogueira v. New York, N.H. & H. R.R.</i> , 281 U.S. 128	29
<i>Northeast Marine Terminal Co. v. Caputo</i> , 432 U.S. 249	passim
<i>O'Keefe v. Smith, Hinchman & Gryllis Associates</i> , 380 U.S. 359	35
<i>Pennsylvania R.R. v. O'Rourke</i> , 344 U.S. 334	29

Cases—Continued:	Page
<i>Perez v. Sea-Land Service, Inc.</i> , 8 B.R.B.S. 130	20
<i>Power Reactor Co. v. Electricians</i> , 367 U.S. 396	35
<i>Reese v. Weyerhaeuser Co.</i> , 8 B.R.B.S. 379	28
<i>Scalmato v. Northwest Marine Terminal Co.</i> , 1 B.R.B.S. 461	19
<i>Sea-Land Service, Inc. v. Director, Office of Workers' Compensation Programs</i> , 540 F.2d 629	20
<i>Southern Pacific Co. v. Jensen</i> , 244 U.S. 205	21, 29, 34
<i>State Industrial Comm'n v. Nordenholt</i> , 259 U.S. 263	29
<i>Stockman v. John T. Clark & Son of Boston, Inc.</i> , 539 F.2d 264, cert. denied, 433 U.S. 908	32
<i>Trafficante v. Metropolitan Life Insurance Co.</i> , 409 U.S. 205	35
<i>Udall v. Tallman</i> , 380 U.S. 1	35
<i>Victory Carriers, Inc. v. Law</i> , 404 U.S. 202	23
<i>Voris v. Eikel</i> , 346 U.S. 328	34
<i>Washington v. W. C. Dawson & Co.</i> , 264 U.S. 219	22
<i>Zenith Radio Corp. v. United States</i> , No. 77-539 (June 21, 1978)	36
Statutes and regulations:	
Act of June 10, 1922, ch. 216, 42 Stat. 634	22

Statutes and regulations—Continued:	Page
Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 <i>et seq.</i> :	
Section 2(3), 33 U.S.C. 902(3) <i>passim</i>	
Section 2(4), 33 U.S.C. 902(4) 6, 30	
Section 3(a), 33 U.S.C. 903(a) 3, 5, 8, 9, 14, 30, 31	
Section 20(a), 33 U.S.C. 920(a) 35	
Section 39, 33 U.S.C. 939 36	
New York Laws of 1914, ch. 41, § 2(10) .. 21	
20 C.F.R. Parts 701 and 702 36	
Miscellaneous:	
118 Cong. Rec. 36265-36274, 36376-36396 (1972) 17	
G. Gilmore & C. Black, <i>The Law of Admiralty</i> (2d ed. 1975) 20	
Hearings on S. 3170 Before a Subcomm. of the Senate Comm. on the Judiciary, 69th Cong., 1st Sess. (1927) 22	
H.R. Rep. No. 639, 67th Cong., 2d Sess. (1922) 22	
H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972) ("H.R. Rep.") 17, 18, 21, 24, 30, 31	
4 A. Larson, <i>The Law of Workmen's Compensation</i> (1976) 20	
Morton, <i>The Longshoremen's and Harbor Workers' Compensation Act: Coverage After the 1972 Amendments</i> , 55 Texas L. Rev. 99 (1976) 20	

Miscellaneous—Continued:	Page
Morton, <i>The Longshoremen's and Harbor Workers' Compensation Act: Coverage Under the 1972 Amendments</i> , 9 J. Mar. L. & Com. 33 (1977)	20
S. Rep. No. 92-1125, 92d Cong., 2d Sess. (1972) ("S. Rep.")	17, 18, 21, 24, 30, 31
U.S. Department of Labor, Office of Workers' Compensation Programs Task Force Report, <i>Longshore and Harbor Workers' Compensation Program</i> (1976)	4, 28
Vickery, <i>Some Impacts of the 1972 Amendments to the Longshoremen's & Harbor Workers' Compensation Act</i> , 41 Ins. Counsel J. 63 (1974)	20
Watson, <i>Broadened Coverage Under the LHWCA</i> , 33 La. L. Rev. 683 (1973)....	20

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-425

P. C. PFEIFFER COMPANY, INC. AND
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
PETITIONERS

v.

DIVERSON FORD AND DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR

AYERS STEAMSHIP COMPANY AND
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
PETITIONERS

v.

WILL BRYANT AND DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

(1)

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (Pet. App. 27-28) is reported at 575 F.2d 79. The original opinion of the court of appeals (Pet. App. 30-55) is reported at 539 F.2d 533. The opinion of the Benefits Review Board in the *Ford* case (A. 41-45) is reported at 1 B.R.B.S. 367, and the opinion of the Benefits Review Board in the *Bryant* case (A. 93-98) is reported at 2 B.R.B.S. 408. The opinions of the administrative law judges (A. 20-40, 64-92) are not reported.

JURISDICTION

The judgment of the court of appeals on remand from this Court was entered on June 16, 1978. The petition for a writ of certiorari was filed on September 13, 1978, and was granted on November 27, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether "maritime employment" within the meaning of the Longshoremen's and Harbor Workers' Compensation Act includes all marine terminal operations that are necessary to transfer cargo between land and water transportation.

STATUTE INVOLVED

Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(3), provides:

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 3(a) of the Act, 33 U.S.C. 903(a), provides:

Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

STATEMENT

1. Diverson Ford, an employee of petitioner P. C. Pfeiffer Company, was injured in the course of his employment at the Port of Beaumont, Texas, on April 12, 1973 (A. 22). On that day Pfeiffer assigned Ford to the job of fastening military vehicles onto

railroad flat cars for shipment inland. The military vehicles had arrived at the port several days earlier; they had been unloaded from a seagoing vessel, stored for a period of time on the dock, and then loaded onto the flat cars. Ford's work was thus the last step in transferring the cargo from sea to land transportation (Pet. App. 46; A. 24-25). Ford performed his work on an open concrete apron dock a few feet from the water's edge (A. 23-24).

Pfeiffer provides a variety of maritime services at the Port of Beaumont, including stevedoring, "warehousing,"¹ and shipping agency services (A. 25-26). The employees in its stevedoring division and shipping agency may work on vessels docked in the port, but employees of its warehouse division do not (A. 26). Under Pfeiffer's practice and the rules of the unions representing Pfeiffer's employees, the work of

¹ Pfeiffer is not in the ordinary "warehousing" business, *i.e.*, storing goods for hire. Its "warehousing" is performed solely in and for the Port of Beaumont, and it comprises an ordinary full range of marine terminal operations (A. 8-9).

Typically, work in a port is divided between a stevedore or stevedoring contractor and a marine terminal operator. The stevedore is responsible for getting cargo on and off the ship, work that is performed by longshoremen in "stevedoring gangs." The marine terminal operator is responsible for the safe handling of the ship, the delivery and receipt of the ship's cargo, and all movement and handling of that cargo any place in the terminal shoreside of the point where the stevedoring gangs pick it up and deposit it. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 254-255 n.4 (1977); U.S. Department of Labor, Office of Workers' Compensation Programs Task Force Report, *Longshore and Harbor Workers' Compensation Program* 103-104 (1976).

removing cargo from vessels is allocated to members of the deep sea longshoremen's local unions, who work in Pfeiffer's stevedoring division. Once the cargo is set down on the dock, all further handling, including moving and loading it onto land transportation for further shipment inland, is allocated to members of the waterfront "warehousemen's" local union,² who work in Pfeiffer's warehouse division (A. 26, 29-30). Although Ford had on occasion worked as a member of a stevedoring gang in Pfeiffer's stevedoring division, he was working as a terminal worker in its warehouse division on the day of his injury (A. 24-25).

As amended in 1972, the Longshoremen's and Harbor Workers' Compensation Act extends benefits to any "employee" (33 U.S.C. 902(3)) who is injured on navigable waters or on an adjoining pier, wharf, terminal, or other adjoining area customarily used by an employer for loading or unloading vessels (33 U.S.C. 903(a)).³ The term "employee" includes "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations" (33 U.S.C. 902(3)). The

² The "warehousemen" are a local affiliate of the International Longshoremen's Association. They work only as terminal workers for waterfront terminal operators such as Pfeiffer.

³ The parties agreed, and the administrative law judge found, that Ford sustained his injury in an area that satisfied the maritime "situs" requirement of 33 U.S.C. 903(a) (A. 33-34).

administrative law judge who considered Ford's claim for compensation under the Act concluded that Ford was not engaged in either "maritime employment" or "unloading" a vessel at the time of his injury. He therefore ruled that Ford was not a statutory "employee" within the meaning of 33 U.S.C. 902(3) (A. 36). And because none of Pfeiffer's employees had unloaded the particular cargo on which Ford was working when he was injured, the administrative law judge ruled that Pfeiffer was not a covered "employer" for the purposes of Ford's claim (A. 37).

The Benefits Review Board reversed and held that Ford is entitled to benefits under the Act. The Board held that even though Ford was not denominated as a longshoreman, the work he was doing at the time of his injury constituted "longshoring operations," and Ford thus was a statutory "employee." Longshoring operations, the Board held, "include intermediate steps subsequent to unloading cargo, still in maritime commerce, from a ship and prior to its removal from the terminal for further transshipment" (A. 44). Because Ford was an "employee," and because Ford and his coworkers were engaged in their maritime employment in a concededly maritime situs, the Board held that Pfeiffer necessarily was an "employer" within the meaning of Section 2(4), 33 U.S.C. 902(4).

2. Will Bryant, an employee of petitioner Ayers Steamship Co., was injured in the course of his employment at Galveston, Texas, on May 2, 1973 (A. 69). Bryant worked at Ayers' marine terminal im-

mediately adjacent to a pier in the Port of Galveston. At the time of his injury, Bryant was engaged in his regular job of unloading cotton from wagons for eventual shipment in seagoing vessels (A. 69-70). Bryant had from time to time worked as a "deep sea longshoreman" in the area, but at the time of his injury he had not done so for several years (A. 60).

Ayers is a shipping agency and terminal operator; it ships cotton from its terminal in the Port of Galveston (A. 50). When loads of cotton arrive at the Port of Galveston, they are delivered to inland compress warehouses. After baling, the cotton is taken from the inland warehouses by wagons to a pier "warehouse," such as the one where Bryant was injured.⁴ "Cotton headers" such as Bryant then unload the cotton from the wagons and stack it in the pier warehouse. Employees denominated as "longshoremen" then move the cotton from the pier warehouse to seagoing vessels (Pet. App. 48).⁵

Ayers does not employ the "longshoremen" directly; it contracts with other employers for their services. But "cotton headers," such as Bryant, work directly for Ayers. Ayers' practice and the pertinent

⁴ The "pier warehouse" in which Ayers accumulates cotton for export, like the "warehouse" operations of Pfeiffer, is not a warehouse in the ordinary sense. As a terminal operator, Ayers makes no charge for storage of cotton at the pier warehouse for the first 15 days, by which time nearly all cotton has been shipped out (A. 59). The "warehouse" is in fact an ordinary marine terminal "transit shed."

⁵ This second transfer of the cotton may occur immediately or may be delayed by as much as two weeks (A. 71).

union rules provide that cotton headers do not go aboard ships to store the cargo in the ships' holds; that work is reserved for those denominated as "longshoremen." The work of the "cotton headers" is concluded when the cotton is stacked in the pier warehouse for transfer onto the ships (A. 70-71).

The administrative law judge denied Bryant's claim for compensation under the Act, concluding that Bryant was not injured at a maritime situs, as defined in Section 3(a) of the Act, 33 U.S.C. 903(a), and that he was not a covered "employee" within the meaning of Section 2(3) of the Act, 33 U.S.C. 902 (3). The warehouse in which Bryant was injured, the administrative law judge found, was "adjacent" to the pier but did not "adjoin" it, and it was therefore not within the statutory definition of a maritime situs (A. 76). Because the cotton came to rest in the warehouse before other workers began to transfer it to the vessels, the administrative law judge concluded that Bryant's work was not part of a "longshoring operation" within the meaning of Section 2 (3) of the Act (A. 87).

The Benefits Review Board reversed and held that Bryant is entitled to compensation under the Act. The Board noted that petitioners apparently had conceded that Bryant's injury occurred in a maritime situs (A. 95), even though the administrative law judge found otherwise. In any event, it held the administrative law judge's conclusion on this issue was erroneous. The warehouse in which Bryant was injured, the Board found, was part of the Ayers marine

terminal and was immediately adjacent to a pier that in turn adjoined navigable waters. And, as the parties had stipulated, the cotton stored in the pier warehouse was taken from the warehouse directly onto waiting vessels. Therefore, the Board concluded, the warehouse satisfied the maritime situs requirement of the Act because it was a "terminal * * * or other adjoining area customarily used by an employer in loading * * * a vessel" (33 U.S.C. 903(a)).

Bryant also met the statutory requirement of maritime status, according to the Board. Bryant was engaged in longshoring operations, the Board held, which "include all essential steps in the overall process of loading cargo" (A. 97). His duties were "an integral part of the continuous longshoring operation" (*ibid.*). Because the Board found that Bryant's job was "the first step in a longshoring operation which would eventually conclude at some future date with the placement of the cotton in the hold of a ship" (A. 98), the Board held that Bryant was within the reach of the statute, which was meant to include "all cargo handling operations performed on land within the confines of a terminal" (A. 97).

3. Petitions for review in both cases were consolidated by the court of appeals with petitions for review in three other cases. The court of appeals upheld the awards of compensation in both cases (Pet. App. 30-55).

In Ford's case, the court observed that the vehicles on which Ford was working at the time of his injury had come to rest after their arrival on the dock and

before they were loaded onto the railroad flat cars (Pet. App. 47). But the court rejected the "point of rest" theory of coverage proposed by petitioners. The court noted that petitioners apparently conceded that Ford would have been covered if his work were part of a continuous operation that began with the cargo's departure from a ship's hold; their contention amounted to a denial of coverage "because of a discontinuity in time created by the cargo's having been stored for a while along the shore" (*ibid.*). The court declined to adopt the "point of rest" theory and held instead that a shoreside worker such as Ford is covered under the Act if he is directly involved in longshoring operations, such as unloading a ship. The work Ford was performing at the time of his injury, the court held, "was evidently an integral part of the process of moving maritime cargo from a ship to land transportation" (*ibid.*). There was therefore an "ample basis" for the Board's determination that Ford was performing covered work.

In Bryant's case, the court agreed with the Board that the situs of Bryant's injury was a waterfront area customarily used by an employer in loading a vessel and that the maritime situs requirement was therefore satisfied (Pet. App. 49). The court also sustained the Board's determination that Bryant was performing the work of an "employee" within the meaning of the Act. Again rejecting the "point of rest" theory that had been applied by the administrative law judge, the court stated that Bryant indisputably would have been involved in "longshoring

operations" if, "instead of setting the cargo down, he had handed it to a 'longshoreman' for immediate loading on board a ship" (Pet. App. 49-50). The brief discontinuity in time created by the cotton's temporary storage, the court held, "did not alter the essential nature of Bryant's work, which was an integral part of the ongoing process of moving cargo between land transportation and a ship" (Pet. App. 50). On that basis, the court held that there was ample support for the Board's conclusion that Bryant was involved in longshoring operations and that he is therefore entitled to compensation under the Act.

4. Petitioners sought review in both cases. The Court vacated the judgments and remanded the cases to the court of appeals for further consideration in light of *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). 433 U.S. 904 (1977).⁶ On remand, the court of appeals reaffirmed its judgments in a brief opinion (Pet. App. 27-28), holding that its prior resolution of the coverage issues presented in the two cases is consistent with the rationale of this Court's decision in *Caputo*.

⁶ The Court remanded a third case that had been decided in the same opinion of the court of appeals. *Director, Office of Workers' Compensation Programs v. Jacksonville Shipyards, Inc.*, 433 U.S. 904 (1977). The court of appeals adhered to its prior judgment in that case as well, and the Director has again petitioned for a writ of certiorari. *Director, Office of Workers' Compensation Programs v. Jacksonville Shipyards, Inc.*, No. 78-1178. That case involves the question whether the location where a particular injury occurred was a maritime situs.

SUMMARY OF ARGUMENT

The Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, provides compensation to all persons injured in a waterfront area, if they fall within the statutory definition of "employees." That definition includes "any person engaged in maritime employment," "any longshoreman," and any "other person engaged in longshoring operations." A person falling within any one of these categories is an "employee" for the purposes of the Act and is entitled to compensation if he suffers a work-related injury on the waterfront.

The Benefits Review Board and the Director consistently have interpreted the terms "longshoring operations" and "maritime employment" to include all tasks performed by marine terminal employees that are necessary to transfer cargo between land and sea transportation. Under this interpretation, both Ford and Bryant are within the coverage of the Act.

This test is consistent with the statutory language and legislative history even though, as this Court pointed out in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977), neither the statute nor the legislative history provides substantial assistance in determining the meaning of the pertinent statutory terms. In light of the traditional understanding that the work of longshoremen includes handling cargo on the waterfront, however, both Ford and

Bryant were engaged in "longshoring operations" and thus in a form of maritime employment.

This construction of the Act also is consistent with the Court's analysis in *Caputo*. There the Court held that workers who were unloading a container long after it had been removed from the vessel were engaged in "longshoring operations" even though they were working entirely on land. In addition, the Court refused to limit the coverage of the Act to persons handling cargo after it leaves its last point of rest on the dock in the loading process and before it reaches its first point of rest on the dock in the unloading process. Accordingly, even though Ford and Bryant worked on the shore and handled cargo only shoreward of the point of rest, they could nonetheless be engaged in longshoring operations and maritime employment within the meaning of the Act.

Petitioners' proposed test for coverage of cargo handlers is too narrow. Under that test, cargo handlers would be covered by the Act only if they were subject to being assigned to work on board a vessel in the course of their work. But by expanding the definition of navigable waters to include waterfront areas, Congress eliminated the distinction between work on board a vessel and work on the waterfront for the purposes of making coverage determinations. Petitioners' test would exclude from coverage all longshoremen and persons engaged in longshoring operations if their employer's practice or union jurisdictional rules did not provide that they would be

subject to assignment to work on board a vessel. That test would reintroduce into the Act the distinction between work on a vessel and work on a dock, the very distinction that Congress sought to eliminate when it amended the Longshoremen's Act in 1972.

The Board's construction of the Act is consistent with the principle that the Act is to be given an expansive interpretation, favoring coverage. Moreover, even if the Court regards the statute as ambiguous on the issue presented here, it should defer to the consistent interpretation of the statute by the Board and the Director since the amendments were enacted.

ARGUMENT

A PERSON EMPLOYED IN A MARINE TERMINAL IS ENGAGED IN "MARITIME EMPLOYMENT" WHENEVER HE IS PERFORMING TASKS NECESSARY TO TRANSFER CARGO BETWEEN LAND AND WATER TRANSPORTATION

A. Any Person Who Engages in "Maritime Employment" is an "Employee" Under the Act

The Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, provides that compensation shall be paid to all "employees" who satisfy the employment "status" test of Section 2(3), 33 U.S.C. 902(3), and who are injured during their employment in places that satisfy the maritime "situs" test of Section 3(a), 33 U.S.C. 903(a). Petitioners acknowledge that Ford and Bryant were injured in waterfront areas that satisfy the maritime

"situs" test (Br. 7 n.11) and that Pfeiffer and Ayers are "employers" within the meaning of the Act (Br. 28 n.62). It also is undisputed that Ford and Bryant were acting in the course of their employment at the time they were injured. This case therefore turns solely on the construction of the employment "status" test of Section 2(3).

Section 2(3) provides that a worker is an "employee" satisfying the status test if he is "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations * * *." All persons engaged in "maritime employment" are covered. Congress did not leave that ambiguous term as the sole definition of the extent of coverage, however; Section 2(3) provides that any "longshoreman" and any "other person engaged in longshoring operations" are engaged in the sort of maritime employment to which the statute applies.

There are, in other words, three ways for a cargo handler to meet the status test of Section 2(3): (1) he can be a "longshoreman" (whether or not he is engaged in longshoring operations); (2) he can be a person "engaged in longshoring operations" (whether or not he is a longshoreman); or (3) he can satisfy the broader generic description of "maritime employment" (whether or not he is a longshoreman or is engaged in longshoring operations).⁷

⁷ We do not discuss in this brief the other occupations that satisfy the status test. Section 2(3) provides that the term "employee" also includes any "harborworker including a ship repairman, shipbuilder, and shipbreaker * * *."

In *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977), this Court explored in detail the background of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act. See 432 U.S. at 256-260. The Court noted that before 1972 the Act had not covered maritime employees injured on land, even if they were involved in clearly maritime pursuits, such as loading or unloading a vessel. See *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969). The 1972 amendments to the Act changed that rule by providing that longshoremen, persons engaged in longshoring operations, and persons engaged in other kinds of maritime employment are covered by the Act even if they are injured on land, as long as the injury occurs in an area used for maritime purposes. See 432 U.S. at 261-265.

The Court concluded in *Caputo* that the terms "longshoreman," "longshoring operations," and "maritime employment" should be understood in light of the broad language of the 1972 amendments, which "suggests that we should take an expansive view of the extended coverage." 432 U.S. at 268. The term "maritime employment" was not meant as a restriction on coverage or meant to be limited to the specific subcategories of employment listed in the definition. Instead, as the Court stated in *Caputo*, "the category of persons engaged in maritime employment includes more than longshoremen and persons engaged in longshoring operations" (432 U.S. at 265 n.25), even though the Court found it unnecessary in *Caputo* to look beyond those subcategories.

The legislative history of the 1972 amendments, although brief,⁸ makes it clear that "maritime employment" includes more than the specific subcategories named in the definition of "employee."⁹ Yet although the pertinent portions of the committee reports provide examples of some kinds of employees who would be covered under the amended Act and some kinds who would not, they stop short of supplying a definition of the governing terms used in the definition of "employee" or a general principle of construction for the definition. The "typical example"¹⁰ of shoreward coverage provided in the reports "clearly indicates an intent to cover those workers

⁸ There was very little debate on the 1972 amendments in either the House or the Senate, and what debate there was focused on other provisions of the bill. See 118 Cong. Rec. 36265-36274, 36376-36396 (1972). The pertinent portions of the House and Senate Reports consist of a discussion less than two pages long entitled "Extension of Coverage to Shore-side Areas," which appears in identical form in both reports. See S. Rep. No. 92-1125, 92d Cong. 2d Sess. 12-13 (1972) ("S. Rep."); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 10-11 (1972) ("H.R. Rep.").

⁹ See, e.g., S. Rep. 13; H.R. Rep. 10-11 (both of which state that the bill provides coverage to longshoremen, harbor workers, ship repairmen, shipbuilders, shipbreakers "and other employees engaged in maritime employment" other than masters and members of the crews of vessels); S. Rep. 16 (the definition of "maritime employment" includes each of the subcategories of employment and "does not exclude other employees traditionally covered" by the Act); see also H.R. Rep. 14.

¹⁰ S. Rep. 13; H.R. Rep. 10-11. See also *Northeast Marine Terminal Co. v. Caputo*, *supra*, 432 U.S. at 266 n.27.

involved in the essential elements of unloading a vessel—taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area.” 432 U.S. at 266-267. This is typically the work of a stevedoring gang. On the other hand, the reference in the reports to “employees whose responsibility is only to pick up stored cargo for further trans-shipment” (S. Rep. 13; H.R. Rep. 11) indicates that “employees such as truck-drivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered” (432 U.S. at 267); see also 432 U.S. at 275 n.37. The reports also state that persons performing purely clerical tasks and not engaged in the handling of cargo are excluded from coverage. S. Rep. 13; H.R. Rep. 11. See 432 U.S. at 267. But, as the Court observed, although the discussion in the reports is useful for “identifying the outer bounds of who is clearly excluded and who is clearly included, it does not speak to all situations” (432 U.S. at 267; footnote omitted). In particular, the legislative history is silent on the question whether coverage extends to persons such as Ford and Bryant who, like the two claimants in *Caputo*, were “engaged in the handling of cargo as it moves between sea and land transportation after its immediate unloading” (*ibid.*).¹¹

¹¹ Bryant's case involves the loading rather than the unloading phase of the longshoring operation, but that makes no difference in the analysis.

B. The Board and the Director Consistently Have Defined “Maritime Employment” to Include All Employees Engaged In Handling Cargo on the Waterfront

The Benefits Review Board found that both Ford and Bryant were engaged in “longshoring operations” and thus in “maritime employment” within the meaning of Section 2(3) (see A. 44, 97). The Board defined “longshoring operations” to include all tasks that are an integral part of the “overall process” of loading or unloading cargo at a marine terminal, *i.e.*, of transferring it between a truck or rail car and a vessel. Under the Board’s construction of the 1972 amendments, the Act covers all persons who remove cargo from a ship, transfer it, check it, load or unload containers, and place cargo in the possession of a consignee (or the consignee’s agent) for overland carriage. When cargo is arriving at the waterfront, the same principles apply; once the cargo has left the possession of the highway or rail carrier, the Act covers all subsequent cargo handling activities until the cargo is safely aboard ship. Any person who participates in the risky task of cargo handling on the waterfront is engaged in “maritime employment,” whether or not his job is locally called “longshoreman.” At the urging of the Director, the Board has consistently taken this position since it was created by the 1972 amendments.¹²

¹² See, *e.g.*, *Avvento v. Hellenic Lines Ltd.*, 1 B.R.B.S. 174 (1974); *Coppolino v. I.T.O. Corp.*, 1 B.R.B.S. 205 (1974); *Scalmato v. Northwest Marine Terminal Co.*, 1 B.R.B.S. 461 (1975); *Dellaventura v. Pittston Stevedoring Co.*, 2 B.R.B.S.

The position taken by the Director and the Board is consistent with the common understanding of the

340 (1975), affirmed, 544 F.2d 35 (2d Cir. 1976), affirmed *sub nom. Northeast Marine Terminal Co. v. Caputo, supra*; *Cabrera v. Maher Terminals, Inc.*, 3 B.R.B.S. 239 (1976), affirmed, 547 F.2d 1162 (3d Cir. 1977), vacated and remanded, 433 U.S. 905 (1977), reaffirmed on remand, 564 F.2d 90 (3d Cir. 1977); *Avena v. Pittston Stevedoring Corp.*, 4 B.R.B.S. 556 (1976); *Makoc v. Universal Terminal & Stevedoring Corp.*, 5 B.R.B.S. 3 (1976); *Fanelli v. Universal Terminal & Stevedoring Corp.*, 6 B.R.B.S. 51 (1977); *Perez v. Sea-Land Service, Inc.*, 8 B.R.B.S. 130 (1978).

The Board's construction of the term "longshoring operations" has been adopted by three of the six deep-water circuits and rejected in only one. In addition to the court below, the Third and Fourth Circuits have accepted the Board's analysis, see *I.T.O. Corp. v. Benefits Review Board*, 563 F.2d 646 (4th Cir. 1977); *Sea-Land Service, Inc. v. Director, Office of Workers' Compensation Programs*, 540 F.2d 629 (3d Cir. 1976), while only the Ninth Circuit has rejected it. *Cargill, Inc. v. Powell*, 573 F.2d 561 (1977), petition for cert. pending, No. 77-1543. The Third Circuit has in fact gone beyond the Board's test, holding that the Act applies to the limits of admiralty jurisdiction. See *Sea-Land Service, Inc. v. Director, Office of Workers' Compensation Programs, supra*, 540 F.2d at 636-637.

Most of the commentators have agreed that the Board's test is the better construction of the Act with respect to cargo handlers. See, e.g., G. Gilmore & C. Black, *The Law of Admiralty* 429-430 (2d ed. 1975); 4 A. Larson, *The Law of Workmen's Compensation* §§ 89.42-89.43 (1976); Watson, *Broadened Coverage Under the LHWCA*, 33 La. L. Rev. 683 (1973); Morton, *The Longshoremen's and Harbor Workers' Compensation Act: Coverage After the 1972 Amendments*, 55 Texas L. Rev. 99, 117-120 (1976); Morton, *The Longshoremen's and Harbor Workers' Compensation Act: Coverage Under the 1972 Amendments*, 9 J. Mar. L. & Com. 33, 53-54 (1977); contra, Vickery, *Some Impacts of the 1972 Amendments to the Longshoremen's & Harbor Workers' Compensation Act*, 41 Ins. Counsel J. 63 (1974).

kind of work that constitutes "maritime employment" in general and "longshoring operations" in particular. As Congress was aware, longshoremen traditionally have performed many tasks that do not require them to shuttle between land and water. This is true not only with respect to containers and other modern cargo handling devices, to which Congress adverted in the Committee reports (S. Rep. 13; H.R. Rep. 11), but also with respect to traditional break-bulk cargo loading and unloading.

In the landmark case of *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), for example, the state statute under consideration defined longshore work as the loading or unloading of cargos "or moving or handling the same on any dock, platform or place, or in any warehouse or other place of storage." New York Laws of 1914, ch. 41, § 2(10). The Court in *Jensen* struck down the New York statute as applied to injuries taking place on the navigable waters in the course of such work, within the exclusive admiralty jurisdiction of the United States, but nothing in *Jensen* or later decisions suggests that the Court or Congress understood longshoring operations to be restricted to work aboard vessels or even to the immediate tasks of loading and unloading vessels.

The board conception of the work of the longshoreman was shared by Congress at the outset of the process that led to the passage of the Longshoremen's and Harbor Workers' Compensation Act in 1927. Congress originally attempted to authorize states to extend their own statutes to apply to maritime ac-

cidents, a course it selected in part because (H.R. Rep. No. 639, 67th Cong., 2d Sess. 2 (1922); emphasis added) :¹³

The work of the longshoremen is not all on ship. Much of it is on the wharves. They may be at one moment unloading a dray or a railroad car or moving articles from one point on the dock to another, the next actually engaged in the process of loading or unloading cargo. *Their need for uniformity is one law to cover their whole employment, whether directly part of the process of loading or unloading a ship or not.*

Recent judicial decisions, too, have recognized that the traditional work of longshoremen may involve more than the simple loading or unloading of ships. See *International Container Transport Corp. v. New York Shipping Association*, 426 F.2d 884, 886 (2d Cir. 1970) :

Historically the work of longshoremen included the preparation of cargo for shipment by making up, for example, drafts and pallets and, in connection with unloading cargo, the breaking up of

¹³ This report accompanied the bill that was eventually enacted as the Act of June 10, 1922, ch. 216, 42 Stat. 634, and held unconstitutional in *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924). See also *Hearings on S. 3170 Before a Subcomm. of the Senate Comm. on the Judiciary*, 69th Cong., 1st Sess. 40 (1927) (Statement of L. B. Clark, United States Bureau of Labor Statistics): “[T]he original endeavor in amending the judiciary act was to give the States control of the whole situation, the whole contract—the man on the dock, the man on the ship, the man on the bridge, or on the ladder or hanging in between.”

drafts and pallets, sorting the cargo according to its consignees and delivering it to the trucks or other carriers.

See also *Humphrey v. International Longshoremen's Association*, 401 F. Supp. 1401, 1406 (E.D. Va. 1975), reversed on other grounds, 548 F.2d 494 (4th Cir. 1977).

Indeed, in the decision of this Court that most immediately generated Congress's extension of the Act's coverage in 1972, the Court recognized that much of the work of “longshoremen” is not “in the service of a ship,” and that the appropriate uniformity of remedy for injured longshoremen therefore could not be achieved through the “unseaworthiness” remedy. See *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212-213 (1971).

In light of this traditional understanding of the scope of tasks that are considered longshoremen's work or “longshoring operations,” and in light of the congressional purpose to provide a uniform program of coverage at adequate rates to waterfront workers, the Board and the Director properly have construed the term “maritime employment” to extend to all physical tasks performed by marine terminal employees that are required to transfer cargo between land and water transportation.

C. This Court's Analysis in *Caputo* Supports a Broad Construction of the Term “Maritime Employment”

Although it acknowledged that the statutory language and legislative history provide little guidance in applying the Act to waterfront cargo handlers,

the Court in *Caputo* nonetheless established a framework that significantly supports our position here.

First, the Court established that an employee may be engaged in "longshoring operations" within the meaning of the Act even if he does not work on board a ship. As the Court noted, Congress recognized that, because of the advent of modern cargo-handling techniques, much of the longshoreman's work that was earlier done on a vessel is now done on land.¹⁴ 432 U.S. at 269-270. Containers, for example, may be loaded, or "stuffed," on shore and then placed by mechanical means on board a container ship without the need for many of the persons engaged in the loading process ever to board the vessel. Nonetheless, stuffing or stripping containers is part of the process of loading or unloading a vessel, and these tasks plainly are "longshoring operations" within the meaning of the Act, even if the employees doing the work never venture on board a ship. 432 U.S. at 270-271. Thus, the Court held that claimant Blundo, a checker who was engaged in checking and marking items as they were removed on shore from containers that had been unloaded from a ship several days earlier at another port, was engaged in "longshoring

¹⁴ The Court cited a passage from the reports that reflected congressional awareness of the increasingly land-based character of longshore work: "It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore." S. Rep. 13; H.R. Rep. 10.

operations" within the meaning of the Act. 432 U.S. at 271.

Second, the Court firmly rejected the "point of rest" theory as a basis for fixing the limits of "longshoring operations" within the meaning of Section 2(3). Under that theory, longshoring operations would include only the portion of the unloading process that takes place before cargo reaches its first point of rest on the dock and only the portion of the loading process that takes place after the stevedoring gang picks up cargo from its last point of rest on the dock to load it into a ship's hold. The Court held that the point of rest theory is inconsistent with the purpose of the Act, because the Act plainly reaches unloading operations that occur after the cargo has first come to rest on the dock and loading operations that occur before the cargo has reached its last point of rest prior to its transfer onto the ship. 432 U.S. at 276. Thus, the Court refused to adopt a restrictive definition of "longshoring operations" that would limit that term to the immediate process of transferring cargo to and from the hold of a ship.

Applying these principles to the present cases strongly supports the results reached by the Board and the court of appeals. These principles make it evident, for example, that there is no distinction between Ford's status and Caputo's that should result in a difference in treatment under the Act. Caputo was engaged in conduct indistinguishable from Ford's at the time of the injuries. The Court found that the Act applied in Caputo's case because, whether or not

loading a consignee's truck with recently arrived maritime cargo constituted "longshoring operations," Caputo was a longshoreman by occupation and was subject on the same day to being assigned to activities that indisputably were longshoring operations.

Much the same situation obtained in Ford's case. The administrative law judge found that the jurisdictional line between work done by the longshoremen's local union and the warehousemen's local union was drawn at the first point of rest for cargo prior to its being placed into a ship's hold (A. 30). Work on the ship's side of the point of rest was done by employees assigned from the longshoremen's local union, while work done shoreward of the point of rest was done by "warehousemen." Because the Court in *Caputo* rejected the "point of rest" test as the governing boundary between maritime and non-maritime employment, however, it is clear that at least some work done by Port of Beaumont "warehousemen" was indisputably maritime in nature.¹⁵ It might include, for example, stuffing or stripping containers, work that the Court held is part of "longshoring opera-

¹⁵ The Court in *Caputo* stated that union membership does not govern the inquiry into whether the employee is engaged in longshoring operations or maritime employment. "The vagaries of union jurisdiction are unrelated to the purposes of the Act," the Court wrote. 432 U.S. at 268 n.30. Therefore, it is not conclusive in determining the coverage of the Act either that the local union through which Pfeiffer hired Ford was denominated a "warehousemen's" local rather than a "deep-sea longshoremen's" local or that the local was an affiliate of the International Longshoremen's Association.

tions" (432 U.S. at 270-271). And because Ford and his fellow workers may be covered by the Act for some of their work, they are covered for all of it, so long as it is performed at a maritime situs. Any other rule would permit the shifting of coverage between state and federal systems, precisely the phenomenon that the 1972 amendments were designed to abolish (432 U.S. at 272-274).

Bryant's work in unloading cotton from dray wagons at the pier warehouse was an integral part of the overall process of loading a vessel, even though his work was done on the shore side of the cargo's last point of rest. Bryant's work, which involved moving the cotton to the location within the warehouse from which it was taken by other workers for direct transfer into a ship's hold, indisputably would be part of the loading process if longshoremen took the cotton directly from Bryant for immediate loading onto the waiting vessels, or if one group of workers did Bryant's job and then moved the cotton again from the pier to the vessels. But to contend that Bryant's work was not part of the loading process because the cotton was at rest in the warehouse for a period of time before it was transferred to vessels is to resurrect the point-of-rest and break-in-time tests that were rejected in *Caputo*. 432 U.S. at 271 n.33, 274-279.¹⁶

¹⁶ Contrary to the peculiar specialization reflected in Galveston cargo handling practices with respect to cotton, the typical waterfront terminal worker is subject to assignment within the course of a day to any cargo handling work other than that allocated to stevedoring gangs. Whether at a con-

D. Petitioners' Proposed Test for Coverage Is Inconsistent with the Purposes of the Statute and the Court's Analysis in *Caputo*

Before the administrative law judge, the Board, and the court of appeals petitioners argued that these cases were governed by the point-of-rest test. That test having been rejected in *Caputo*, petitioners now advance their alternative test for the coverage of the Act. This test, they contend, is faithful to the language and the legislative history of the Act as well as to the decision in *Caputo*. They suggest that a waterfront employee should be regarded as engaged

tainer terminal, a dry or liquid bulk cargo terminal, or an ordinary break-bulk cargo facility, the terminal workers are normally subject to reassignment to a variety of tasks, including the land-transportation receipt and delivery operations involved in these cases. Among the tasks to which terminal workers typically may be assigned are stuffing or stripping containers, "palletizing" cargo, engaging in large-unit banding, and mixing bulk cargos in storage at the terminal to a ship's specifications and then conveying them through belts, blowers, or pipes to a spout in the ship's hold. See, e.g., *Reese v. Weyerhaeuser Co.*, 8 B.R.B.S. 379 (1978); *Cabrera v. Maher Terminals, Inc.*, *supra*; *Mildenberger v. Cargill, Inc.*, 2 B.R.B.S. 51 (1975); U.S. Department of Labor, Office of Workers' Compensation Programs Task Force Report, *Longshore and Harbor Workers' Compensation Program* 103-104 (1976).

These tasks, to which terminal workers are subject to being assigned from day to day or even within a single day, include functions that are indisputably "longshoring operations" under *Caputo*. To construe the Act to reach some cargo handling operations in a marine terminal but not others would thus expose many terminal workers to the "shifting and fortuitous coverage that Congress intended to eliminate." 432 U.S. at 274.

in "maritime employment" only if he is subject at the time of his injury to being assigned to work on board a vessel. For a number of reasons, this test is unworkable as well as unfaithful to the Court's decision in *Caputo*.

First, the test has no basis in the statutory language. Petitioners contend that the term "maritime employment" has always meant employment performed on navigable waters and does not include any work performed on shore. In support of this contention, petitioners cite several pre-1972 cases in which the Court held that employees injured on navigable waters could recover under the Longshoremen's Act, while employees injured on land could not. But in 1972 Congress abandoned the waterfront line established in *Southern Pacific Co. v. Jensen*, *supra*, and moved the Longshoremen's Act coverage ashore. If the concept of "maritime employment" has ever been limited to persons who spend at least some of their time on the water,¹⁷ Congress abandoned that

¹⁷ The cases on which petitioners principally rely, *Pennsylvania R.R. v. O'Rourke*, 344 U.S. 334 (1953); *Nogueira v. New York, N.H. & H. R.R.*, 281 U.S. 128 (1930); and *State Industrial Comm'n v. Nordenholt*, 259 U.S. 263 (1922), may well stand for the proposition that all employment performed on the water is "maritime employment," but they do not suggest that "maritime employment" is limited to such work. The point of these cases, and the line of cases restricting the pre-1972 coverage of the Longshoremen's Act to injuries occurring over water, was that it was the location of the injury, not the maritime character of the work, that governed the coverage of the Act.

interpretation of the term in 1972. The statute identified shore-based workers such as shipbuilders as being engaged in maritime employment,¹⁸ and it included a variety of locations on land within the definition of "navigable waters." See 33 U.S.C. 902(4) and 903(a). Therefore, even if petitioners are correct that maritime employment includes only employment on "navigable waters," all waterfront workers who work on piers, wharves, terminals and other areas adjoining navigable waters are engaged in maritime employment. The statute therefore contains no express or implied requirement that maritime employees be subject to assignment to work on board vessels.

Nor does petitioners' test draw significant support from the legislative history. Petitioners rely heavily on the last two sentences in the pertinent portion of the reports, which read as follows (S. Rep. 13; H.R. Rep. 11):

Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose

¹⁸ Although the structure of the definition of "employee" in Section 2(3) does not make it clear that all of the kinds of workers listed in the section are meant to be varieties of "maritime employment," the legislative history makes it clear that that was the intention of the drafters. See S. Rep. 16.

employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

Petitioners argue that by these two sentences the Committees meant to indicate that "maritime employment" was restricted to employment on the water. But again, Congress had just defined navigable waters to include piers, wharves, dry docks, terminals and other waterfront areas adjoining the water. Therefore, these two sentences are consistent with the view that maritime employment includes employment on navigable waters, as defined to include these waterfront areas. Only the last clause of the second sentence is inconsistent with this interpretation, and it is difficult to assign much weight to that clause, as the drafter appears simply to have ignored the expansion of the definition of "navigable waters" in Section 3(a) of the statute.¹⁹

Third, petitioners' proposed test is inconsistent with *Caputo*. As *Caputo* makes clear, longshoring operations need not involve work on board a vessel. Containers and other modern cargo-carrying devices can be loaded and unloaded by longshoremen who never leave the docks and are not subject to being assigned to work on a vessel. Even loading and unloading of break-bulk cargo can be done by longshoremen who are not subject to assignment on board vessels: one crew may work on board the ves-

¹⁹ See S. Rep. 16; H.R. Rep. 14 (section-by-section analysis).

sel and another crew may work on the dock, but both are indisputably engaged in loading or unloading the vessel, and both are indisputably covered for their full employment by the Act.²⁰

Fourth, petitioners' test subjects the coverage of the Act to the whim of the employer. This was a factor in the Court's rejection of the point of rest test in *Caputo*. See 432 U.S. at 276 n.38. Petitioners themselves acknowledge that "Congress did not intend for shipowners or stevedoring companies to be able to avoid the more liberal compensation benefits of the Longshoremen's Act by the expediency of moving maritime employment activities from the vessel onto the dock" (Br. 37 n.71). By the same token, an employer should not be able to defeat coverage under the Act for some of its employees simply by organizing its longshoring operations so that some workers are permanently assigned to work on the dock.

Finally, notwithstanding petitioners' insistence that their test would have the advantage of easy application, it appears that petitioners' test would raise as many questions as it would answer. Should the deter-

²⁰ This arrangement of stevedoring gangs is not merely hypothetical, as is illustrated by the example in Bryant's brief regarding the practice of unloading bananas in Galveston (Br. 12 n.2). One crew of longshoremen is permanently assigned to the vessel and another is permanently assigned to the dock. Under petitioners' test, the crew assigned to the dock would not be covered by the Longshoremen's Act, a result that is patently at war with the language and purposes of the Act and the decision in *Caputo*. See *Stockman v. John T. Clark & Son of Boston, Inc.*, 539 F.2d 264, 277 (1st Cir. 1976), cert. denied, 433 U.S. 908 (1977).

mination that a particular employee was "subject to assignment" to work aboard ship depend on whether the description of his job for a particular day subjected him to possible assignment aboard a vessel or whether his general employment subjected him to assignment aboard a vessel? For example, if stevedoring gangs are formed on a daily basis, and a worker is hired to do dock work on a day that a vessel is not in port, the worker would not be subject to being assigned to work on board a vessel on that day; yet he might well be assigned to shipboard work on the next day as a member of a stevedoring gang composed of the same persons with whom he had been working on the dock. Similarly, if the practice in the port is to hire longshoremen as terminal workers on some days and as members of stevedoring gangs on other days, would the worker not be covered by the Act on those days that he worked as a terminal worker unless terminal workers were subject to assignment aboard vessels? Would the answer be different if the practice at the port was to make up stevedoring and terminal-work gangs in the course of a day, so that a terminal worker not subject to assignment on board a ship in the mornings could be placed with a stevedoring gang in the afternoon and be subject to assignment aboard ship at that time? Far from leaving the field clear of difficulty, petitioners' test would pose serious line-drawing problems even in the narrow context of break-bulk cargo handling.

In short, petitioners' test resurrects the *Jensen* line in an even more unsatisfactory form. While under *Jensen*, workers were covered only when they crossed the shoreline, under petitioners' test workers would be covered only if they were "subject to" crossing that line. That test would be as arbitrary as the *Jensen* test, without the advantage of its relative simplicity of application. In light of the difficulties that would be posed for the Director and the Board in administering the Act under petitioners' test, that test is not an appropriate substitute for the interpretation that the Director and the Board have developed in applying the Act to waterfront cargo handlers.

E. Any Ambiguity in the Statute Should Be Resolved in Favor of Coverage

1. *The Act is a remedial statute and should be liberally construed*

To the extent there is any ambiguity in the 1972 amendments, it should be resolved in favor of coverage. As this Court has held, the Act must be "liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Voris v. Eikel*, 346 U.S. 328, 333 (1953). Courts applying this principle have held that "the broadest ground [the Act] permits of should be taken." *De Bardeleben Coal Corp. v. Henderson*, 142 F.2d 481, 484 (5th Cir. 1944), quoted with approval in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 130 (1962). In *Caputo*, as we have noted, the Court

underscored the broad language of the 1972 amendments and wrote that in light of that broad language and the remedial purposes of the Act, "we should take an expansive view of the extended coverage" (432 U.S. at 268). Accordingly, under the 1972 amendments as under the pre-1972 Act, any ambiguities that the Court may find in the statutory language and legislative history should be resolved by adopting an interpretation of the Act favoring coverage for the injured worker.

2. *The Court should defer to the consistent administrative interpretation of the Act*

The Act contains a presumption that disputed claims come within its coverage. Section 20(a), 33 U.S.C. 920(a). This Court has applied that presumption, and the associated principle that the views of the agency charged with the Act's administration are entitled to great deference,²¹ in fashioning a rule that administrative decisions should be upset only on a showing of the clearest abuse. See, e.g., *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 474 (1947); *Davis v. Department of Labor*, 317 U.S. 249, 256 (1942); *O'Keefe v. Smith, Hinchman & Gryllis Associates*, 380 U.S. 359, 363 (1965). There has been no abuse here.

²¹ See *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Power Reactor Co. v. Electricians*, 367 U.S. 396, 408 (1961).

The Court also has held on numerous occasions that when a statute reasonably may be read in several ways, the agency charged with the administration of the statute may select a reasonable interpretation, and the courts will defer to its selection. See, e.g., *Board of Governors v. First Lincolnwood Corp.*, No. 77-832 (Dec. 11, 1978), slip op. 13-14, 16-17; *Zenith Radio Corp. v. United States*, No. 77-539 (June 21, 1978); *NLRB v. Iron Workers Local 103*, 434 U.S. 335, 350 (1978). In the instant cases the Board has interpreted the Act from the beginning in a reasonable fashion, informed by its experience with different situations in different ports,²² and its decision—concurred in here by the Director, who has the responsibility for the day-to-day administration of the Act—is entitled to deference.²³ There is a “reasonable legal

²² The Court has recognized that work practices differ from port to port. *Northeast Marine Terminal Co. v. Caputo*, *supra*, 432 U.S. at 276 n.38. See note 16, *supra*. This case therefore calls for “awareness of the practical expertise which an agency normally develops, and *** a willingness to accord some measure of flexibility to such an agency as it encounters new and unforeseen problems over time.” *International Brotherhood of Teamsters v. Daniel*, No. 77-753 (Jan. 16, 1979), slip op. 14 n.20.

²³ Under Department of Labor Regulations, the Board has the responsibility for applying the Act to individual cases in formal proceedings, and the Director has general superintendence over the administration of the Act and its application in the overwhelming majority of cases decided informally. See Section 39, 33 U.S.C. 939; 20 C.F.R. Parts 701 and 702. Although the 1972 amendments abolished the system under which awards of deputy commissioners were reviewed initially by district courts, there is no indication in the amendments or their legislative history that the Board and the Director are

basis” (*Cardillo v. Liberty Mutual Insurance Co.*, *supra*, 330 U.S. at 479) for the award of benefits to Ford and Bryant, and the awards therefore should be upheld.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

CARIN ANN CLAUSS
Solicitor of Labor

LAURIE M. STREETER
Associate Solicitor

GEORGE M. LILLY
JOSHUA T. GILLELAN, II
Attorneys
Department of Labor

WADE H. MCCREE, JR.
Solicitor General

WILLIAM C. BRYSON
Assistant to the Solicitor General

FEBRUARY 1979

entitled to less deference than the deputy commissioners. Indeed, since the 1972 amendments created a central and uniform system of administration to replace the several independent deputy commissioners, the Director and the Board should be entitled to greater deference. These cases present no occasion for consideration of whether the Board’s view, the Director’s, or neither, should be afforded deference where the Board and the Director disagree. Cf. *Director, Office of Workers’ Compensation Programs v. O’Keefe*, 545 F.2d 337 (3d Cir. 1976) (neither entitled to deference).

Supreme Court, U. S.
FILED

MAR 12 1979

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

NO. 78-425

P. C. PFEIFFER CO., INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

Of Counsel:

ROYSTON, RAYZOR,
VICKERY & WILLIAMS

E. D. VICKERY
W. ROBINS BRICE
3710 One Shell Plaza
Houston, Texas 77002
Attorneys for Petitioners

SUBJECT INDEX

	<i>Page</i>
REPLY BRIEF FOR THE PETITIONERS	1
COURT OF APPEALS AUTHORITY	7
MARITIME EMPLOYMENT	10
REPLY TO RESPONDENTS JUDICIAL DEFERENCE ARGUMENTS	14
CONCLUSION	16
ADDENDUM A	A-1

LIST OF AUTHORITIES

	<i>Page</i>
CASES	
Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1978)	10
Cargill v. Powell, 573 F.2d 561 (9th Cir. 1977)	10
Conti v. Norfolk and Western Railway Company, 566 F.2d 890 (4th Cir. December 8, 1977)	8
Director, OWCP v. Rasmussen, et al., ____ U.S. ___, No. 77-1465, decided February 20, 1979	7
International Brotherhood of Teamsters v. Daniel, ____ U.S. ___, 47 L.W. 4135, 4138 n. 20 (1979)	16
I.T.O. Corp. v. Benefits Review Board, 563 F.2d 646 (4th Cir. Sept. 22, 1977)	8
Maher Terminals, Inc. v. Farrell, 548 F.2d 476, 478 (1977)	2
Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969)	5
Northeast Marine Terminal, Inc. v. Caputo, 432 U.S. 272 (1977)	cited throughout
Pennsylvania R.R. Co. v. O'Rourke, 344 U.S. 334 (1953)	9
Sedmak v. Perini North River Associates, 9 B.R.B.S. 378 382-383 (November 30, 1978)	14
Southern Pacific v. Jensen, 244 U.S. 205 (1917)	5

UNITED STATES STATUTES

33 U.S.C.A. § 902(3)	14
33 U.S.C.A. § 902(4)	3
33 U.S.C.A. § 903(a)	7
33 U.S.C.A. § 920(a)	14
33 U.S.C.A. § 941	3

FEDERAL REGULATIONS

29 C.F.R. 1915	3
29 C.F.R. 1916	3
29 C.F.R. 1917	3
29 C.F.R. 1918	3
29 C.F.R. 1918.3(i)	3, 6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

NO. 78-425

P. C. PFEIFFER CO., INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

The resolution of the issue which the Court did not
have to answer in *Caputo* is now sharply in focus:

In extending the Act's jurisdiction ashore in 1972,

(1) did Congress intend to provide a uniform compensation system for amphibious workers who were covered prior to 1972 for only that part of their work done on navigable waters (as Petitioners contend)

or

(2) did Congress intend to cover "all waterfront workers who work on piers, wharves, terminals and other areas adjoining navigable waters" (as the Federal Respondent contends)?¹

All agree the resolution of this issue turns on the meaning of the term "maritime employment" in the Act. The Court will recognize that the Federal Respondent's position here is substantially broader than his position in *Caputo*, where as the Court observed

"[M]aritime employment,' in his view, 'include[s] all physical tasks performed on the waterfront, and particularly those tasks necessary to transfer cargo between land and water.' " 432 U.S. at 272

In broadening its *Caputo* position on the maritime employment status test, the Federal Respondent in effect proposes that all coverage questions be based on situs only—*all waterfront workers* injured on the water or on an adjoining area ashore are covered.²

1. The Federal Respondent contends that all such waterfront workers "are engaged in maritime employment" (Br. p. 30), and that "Congress eliminated the distinction between work on board a vessel and work on the waterfront (ashore) for the purposes of making coverage determinations." (Br. p. 13).

2. The Court will recognize this as being the same as the holding of the Benefits Review Board discussed in Footnote 34 of the *Caputo* opinion, 432 U.S. at 272, which holding the Third Circuit set aside in *Maher Terminals, Inc. v. Farrell*, 548 F.2d 476, 478 (1977).

The "maritime employment" requirement for employers in Section 2(4) of the Act as originally passed in 1927 [33 U.S.C.A. § 902(4)] has been defined by the Court since 1930 as an employer who had at least one amphibious employee who performed part of his work on navigable waters.^{2a} The Federal Respondent seeks to avoid having this established definition of "maritime employment" applied to the work of the employee now that the 1972 Amendments require the employees also to meet the "maritime employment" test.

The Federal Respondent attempts to obtain such a result by defining the term "longshoring operations" to include all marine terminal operations, and all waterfront work, even though the Secretary of Labor has since 1960 specifically defined the term "longshoring operations" as follows:

"The term 'longshoring operations' means the loading, unloading, moving or handling of cargo, ship's stores, gear, etc., into, in, on, or out of *any vessel on the navigable waters* of the United States."³
(Emphasis supplied).

2a. See full discussion in the Brief For The Petitioners, pages 19 to 30.

3. In 1958 Congress amended Section 41 of the Longshoremen's Act and authorized the Secretary of Labor to promulgate safety and health regulations for all employment covered by the Act. 33 U.S.C.A. § 941. These regulations were promulgated in 1960, and now appear as 29 C.F.R. 1918. The Secretary of Labor has made no change to date in the definition of longshoring operations contained therein. 29 C.F.R. 1918.3(i). Thus, the allegedly consistent position of the Director and Board since 1972 that this term includes all marine terminal operations is at odds with the Secretary of Labor's own definition which had been in effect for 12 years prior to the 1972 Amendments and has remained in effect unchanged ever since. Pursuant to this same Section 41 of the Act, the Secretary of Labor also has defined the other occupational terms used by Congress in the 1972 Amendments—shipbuilders, 29 C.F.R. 1916, ship repairmen, 29 C.F.R. 1915, and ship breakers, 29 C.F.R. 1917.

The jurisdictional limits both ashore and afloat of the Department of Labor's entire safety program for "longshoremen and other persons engaged in longshoring operations" have for nearly nineteen years been based on this definition. By the time Congress enacted the 1972 Amendments it has obviously proved to be a jurisdictionally workable definition for more than 12 years.⁴

Thus, Congress was not using undefined terms, and by no stretch of the imagination can Bryant's unloading of the cotton dray wagon or Ford's securing of the military vehicle on the railroad car be made to fit either definition.⁵ One of the biggest problems in disregarding these already established definitions and groping for some new concepts, as the Federal Respondent would have us do, is that waterfront practices may vary from port to port, or region to region, or state to state. Navigable waters are the single common thread which runs nationwide, and it is the maritime part of amphibious employment (like Caputo's) which created the non-uniformity of compensation remedies in the historical context of Longshoremen's Act jurisprudence. Caputo was subject to being assigned to work both ashore and afloat, but Ford and Bryant were in no way subject to working on

4. Had it not been such a workable definition, the Secretary would surely have discussed it and changed it by 1972, or at least during the six years in which his Director of the Office of Workers' Compensation Programs and his Benefits Review Board have alleged that the Secretary's definition didn't go far enough ashore for compensation purposes.

5. Caputo met the Court's maritime employment definition because he was an amphibious worker. Contrary to the Federal Respondent's assertions, the Court did not hold that the loading of the truck by Caputo and the consignee's truck driver was a "longshoring operation." As the Court observed, Caputo was engaged in "the old fashioned process of putting goods already unloaded from a ship . . . into a delivery truck." 432 U.S. at 272.

navigable waters. Caputo was subject to the evil which Congress sought to eliminate—having his compensation benefits "depend on the fortuitous circumstance of whether the injury occurred on land or over water."⁶ Ford and Bryant were not!

Although waterfront practices vary from port to port, the statutory jurisdictional standard must apply nationwide, and the Congress was acting in the historical context of Longshoremen's Act jurisprudence, not trying to reconcile traditional maritime practices (whatever those might be in any given port). Ever since *Southern Pacific v. Jensen*, 244 U.S. 205 (1917), longshoremen's compensation jurisprudence has been oriented to and defined in the context of the navigable waters of the United States. It was navigable waters which compelled Congress to pass the Longshoremen's Act in 1927, and after some 42 years of attempting to apply it both ashore and afloat, this Court recognized that the original Longshoremen's Act was intended by Congress to deal solely with injuries seaward of the water's edge. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969). This recognition established a clearly discernible standard for Longshoremen's Act jurisdiction (the navigable water's edge), but that standard had the disadvantage that persons covered by the federal remedy for part of their activity would walk out of coverage whenever they left the ship. Accordingly, limiting its post-amendment coverage to employees in maritime employment, the Congress in 1972 extended the relevant situs to adjoining areas ashore for the purpose, as articulated in the Committee Reports, of providing a uniform compensation system to those who were covered by the Act for that part of their activity on

6. S. Rep. 13; H.R. Rep. 10.

navigable waters. Note again that Congress was acting in the historical context of the Longshoremen's Act, which throughout its history has been oriented to and had its jurisdiction determined by the navigable waters. Note also that the navigable waters standard is also part of the definition of longshoring operations in the Department of Labor's own regulations.⁷

The Federal Respondent's attention to concepts of "traditional longshoring activities," which unquestionably vary on a nationwide basis as is demonstrated by comparison of the work practices described in *Caputo* with the work practices of the present cases, necessarily would require the resolution of continuing fact questions and would result in a variable standard on a nationwide basis, for the reason that practices traditional in one area may not be so in another. The Congressional adherence to the navigable waters, maritime employment concept familiar in Longshoremen's Act jurisprudence is not subject to these weaknesses. The common denominator nationwide is "navigable waters." It was "navigable waters" which required Congress to pass the Longshoremen's Act in 1927 when they would have preferred to leave it to the states. It was "navigable waters" which created the problem of non-uniform compensation coverage. That Congress intended "navigable waters" to be the basis on which the problem was solved is clearly demonstrated by the last sentence of the Committee Reports:

"Thus, an individual employed by a person none of whose employees work, in whole or in part, on

7. 29 C.F.R. 1918.3(i), discussed *supra* at note 3. The pertinent language is: " * * * into, in, on, or out of any vessel on the navigable waters of the United States."

navigable waters, is not covered even if injured on a pier adjoining navigable waters."⁸

COURT OF APPEALS AUTHORITY

The Federal Respondent's claim that the Board's "construction of the term 'longshoring operations' has been adopted by three of the six deepwater circuits and rejected in only one," (Br. p. 20, fn.12), is simply not true. Only the Fifth Circuit has done so, and in the present cases. The Fourth Circuit has not only declined

8. The Federal Respondent suggests the drafter of this sentence must have "simply ignored" the extension of the coverage ashore in Section 3(a) of the Act. 33 U.S.C.A. § 903(a). The Court has only recently rejected a similar suggestion of Congressional inadvertence from the Federal Respondent in No. 77-1465, *Director, OWCP v. Rasmussen, et al.*, ____ U.S.____, decided February 20, 1979. The erroneousness of this assertion is graphically demonstrated by this same drafter's affirmative statements as to other persons who were not to be covered even though injured on a pier adjoining navigable waters.

1. "The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for (that) part of their activity (on navigable waters)." If an employee did not work at least part of his time on navigable waters, he did not have in 1972 and still does not have a uniformity problem. Contrast the uniformity problems the Federal Respondent's cover the waterfront approach will create for all employees who have to go onto the adjoining areas of the waterfront to do business with a marine terminal operator, but are not amphibious workers as they never have to go on navigable waters.
2. "The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel just because they are injured in an area adjoining navigable waters used for such activity."
3. "Thus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo." All of the above quotations are from the Committee Reports, S. Rep. 13; H.R. Rep. 10-11. (S. Rep. 92-1125, p. 13; H. Rep. 92-1441, p. 11; 1972 U. S. Code Cong. and Administrative News, pp. 4707-4708).

to accept the Board's view, but rejected it approximately two and one-half months after *I.T.O. Corp. v. Benefits Review Board*, 563 F.2d 646 (4th Cir. Sept. 22, 1977), on which the Federal Respondent relies.⁹ The Fourth Circuit did so in *Conti v. Norfolk and Western Railway Company*, 566 F.2d 890, decided December 8, 1977. In *Conti*, the three injured employees were all engaged directly in the process of unloading coal from railroad cars into a hopper or receiving bin from which it was placed on an underground conveyor belt and taken im-

9. The Federal Respondent's reliance on this case is misplaced in any event. The *I.T.O. Corp.* case is what has become commonly referred to by the bar as the *Adkins* case. The opinion cited, 563 F.2d 646, is the Fourth Circuit's per curiam action following the Court's remand of the case to them for further consideration in light of *Caputo*. The Fourth Circuit simply stated that *Adkins* "satisfied both the status and situs requirements of the 1972 Amendments to the Act, as interpreted" by this Court in *Caputo* (563 F.2d at 648). This per curiam opinion of September 22, 1977 followed advices to the Clerk of the Court by letter dated September 14, 1977 from the attorney for the employer and insurance carrier that:

"I.T.O. Corporation of Baltimore and Liberty Mutual Insurance Company have no objection to the entry of an order to the effect that, in view of the Supreme Court's decision in *Northeast Marine Terminal, Inc. v. Caputo*, 432 U.S. ____, their Petition for Review in this case is denied and the order of the Benefits Review Board is affirmed. This will dispose of the instant case.

"I am informed by attorneys for the United States and for Mr. *Adkins* that they concur in this disposition."

A complete copy of the letter to the Clerk which reflects a copy was sent to the Federal Respondent's attorneys is printed in Addendum A, *infra*, page A-1. That *Adkins* was an amphibious worker just like *Caputo* and subject to assignment on navigable waters in addition to his duties in loading the truck is clear from the record in *Adkins*. See attached reprint from the Joint Appendix in *Adkins* in Addendum A, *infra*, pp. A-2 to A-4. It would have been foolhardy for the employer or the insurance carrier, or indeed even the Fourth Circuit to have held that *Adkins* did not meet the *Caputo* standard of an amphibious worker. Under the circumstances, and with the Fourth Circuit sitting in banc and the per curiam opinion issuing only 6 or 7 days after counsel's letter, we do not see how the Federal Respondent can seriously suggest to the Court that the Fourth Circuit has adopted the Board's view.

mediately to the shiploaders on the pier where it was loaded into the hold of a ship. Under these facts, it is perfectly clear that the three injured employees in *Conti* were engaged in "maritime employment" in the Federal Respondent's view since their work involved physical tasks performed on the waterfront and particularly those tasks necessary to transfer cargo between land and water transportation. That the Fourth Circuit was fully aware of the Federal Respondent's view is clear from the Fourth Circuit opinion which quotes this view in full directly from this Court's opinion in *Caputo*.¹⁰ The Fourth Circuit held these employees were not engaged in maritime employment because they were "unloading a coal train, not loading a vessel."¹¹

As to the Third Circuit case relied on as accepting the Board's view, even the Federal Respondent had to acknowledge that it had gone even further than the Board and that, in fact, the Third Circuit's decision was based on its view that the Act as amended in 1972 should apply to the full extent of the limits of admiralty jurisdiction. This can hardly be classified as accepting the "Board's analysis," (Br. p. 20, fn. 12).

10. The Fourth Circuit opinion states:

"The Director of the Office of Workers' Compensation Programs had urged upon the Court the view that 'maritime employment,' as used in the Amendments, should include 'all physical tasks performed on the waterfront, and particularly, those tasks necessary to transfer cargo between land and water transportation.' *Id.*, 432 U.S. at 272, 97 S.Ct. at 2361." 566 F.2d at 894.

11. 566 F.2d at 895. If the Fourth Circuit had adopted the Federal Respondent's view, the Longshoremen's Act would have been the employees' exclusive remedy, for when a railroad worker is injured within the jurisdiction of the Longshoremen's Act, the Federal Employers Liability Act for railroad workers is inapplicable. The Court expressly so held in *Pennsylvania R.R. Co. v. O'Rourke*, 344 U.S. 334 (1953).

In addition to the Ninth Circuit case recognized by the Federal Respondent to have rejected its construction of the term "maritime employment," which is still pending on a petition for certiorari, *Cargill v. Powell*, 573 F.2d 561 (9th Cir. 1977), the Ninth Circuit also applied the Court's amphibious worker definition of maritime employment from *Caputo* to a gearlockerman whose duties required him to work both on vessels and on adjoining areas in *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978).

Thus, even if we consider the Third Circuit in the Federal Respondent's camp, it is at best an even split. But more significantly, the Ninth and Fourth Circuits, the only two courts which have discussed the Court's holding in *Caputo*, have both rejected the Board's view. Unfortunately, the Fifth Circuit's per curiam opinion on remand following *Caputo* is of no real help to anyone.

MARITIME EMPLOYMENT

The Federal Respondent suggests three alternative qualifications for employee status: as a longshoreman *or* a person engaged in longshoring operations *or* a person in maritime employment. (Br. p. 15). Petitioners submit that the statutory language requires that all covered employees be in maritime employment. 33 U.S.C. § 902(3). Longshoremen and those other persons engaged in longshoring operations are recognized by Congress to be subject to assignment aboard vessels, and therefore in maritime employment and subject to the pre-Amendment shifting coverage eliminated in 1972. A few brief comments are offered on three of the Federal Respondent's criticisms of Petitioners' suggested maritime employment status test, the first two criticisms having already been covered either in Petitioners' original or this reply brief.

1.

The Federal Respondent asserts Petitioners' test is inconsistent with *Caputo* because one gang may work on board a vessel and one gang may work on the dock in loading or unloading a vessel and cites the alleged practice of unloading bananas in Galveston (Br. pp. 31-32 and fn. 20). Unfortunately, the Respondent Bryant's Brief does not tell the whole story, for all such banana boat unloading workers are subject to being assigned to work either on the vessel or the dock. An interesting demonstration of this fact occurred approximately a year ago when two longshorewomen found the physical task of handling the bananas on board the vessel was greater than they were able to bear. Therefore, two of the longshoremen working on the dock were assigned to work aboard the vessel to replace them and the two ladies were assigned to complete their day's work on the dock where the physical tasks were not as heavy or onerous.

Whether the actual shifting of employees from the dock onto the vessel and vice versa during the course of a day's work is frequent or infrequent, as *Caputo* holds, it is the fact that the employee is subject to being assigned to work on navigable waters which makes him the amphibious worker for whom Congress desired to provide a uniform compensation remedy.

2.

The Federal Respondent suggests Petitioners' proposed maritime employment status test will make the coverage of the Act subject to the whim of the employer because an employer would allegedly be able to defeat coverage under the Act simply by organizing its longshoring operations so that some workers are permanently assigned to

work on the docks (Br. p. 32). This assertion by the Federal Respondent demonstrates a complete lack of familiarity with the facts of life on America's waterfronts. Any such change in work practices could be made only with the approval and agreement of the employees' labor unions. Neither Mr. Teddy Gleason's International Longshoremen's Association on the Atlantic and Gulf Coasts or Mr. Harry Bridges' International Longshoremen's & Warehousemen's Union on the Pacific Coast would tolerate any such unilateral action by an employer. To anyone even remotely familiar with the power of these longshore unions it is ludicrous to contend that the coverage of the Longshoremen's Act is subject to the whim of the employer by the simple expedient of assigning employees to work permanently on the docks. With the Union's permission? Perhaps. Without it? Impossible.¹² As noted above, an individual's duty at the moment of injury is not the touchstone. Petitioners submit that as conceived by the Congress, maritime employment encompasses an individual like Caputo because his employment could have taken him aboard a vessel, even though his duties at the moment of accident would not. Conversely, Ford and Bryant were not in maritime employment because no element of their respective employments could ever have taken them on the navigable waters.

12. The Court needs to be aware of the fact that the foreman of a longshore gang is the one who assigns the individual longshoremen to work either on the dock or on the vessel and it is the gang foreman who can change this assignment. The Stevedoring Superintendent cannot do so without the gang foreman's agreement. In the West Gulf area these gang foremen are elected by the union members and not by stevedoring company employers, and while an employer does not have to accept an incompetent gang foreman, he does not otherwise have any choice but to accept the gang foremen sent to him by the union from the union's hiring hall.

3.

The Federal Respondent suggests through a series of hypothetical questions that Petitioners' proposed test would present substantial administrative problems to him in the administration of the Act. The Petitioners' proposed test draws the jurisdictional line at substantially, if not exactly, the same place the Secretary of Labor has been drawing it for the purpose of his Safety & Health Rules for Longshoring since 1960. That he has not had to change it in nearly 19 years is persuasive evidence that such an approach is practical and workable.

Nor is there any cause for concern that the *Jensen* line is involved in determining the Act's jurisdiction ashore. This is the line that created the non-uniform compensation problem which Congress desired to eliminate. After 42 years, the Court finally made the *Jensen* line an arbitrary one—the water's edge. Then, and then only, were substantially all, if not all, of the Act's coverage questions resolved. The water's edge is readily discernible; what could be more simple or easy than using this congressionally decreed landmark to recognize the jurisdictional status? The inquiry is simply

Was the injured employee subject to being assigned to work on both the landward and seaward sides of the *Jensen* line on the date of his accident?¹³

If so, he is an amphibious worker like Caputo for whom Congress intended to provide a uniform compensation system through the 1972 Amendments.

13. Or it would be:

Was the injured employee subject to being required to cross the *Jensen* line on the day of his accident?

Establishing a definitive jurisdictional line between federal and state jurisdictions may be one of the few places where arbitrariness is a virtue.¹⁴ We submit Congress wanted the new jurisdictional line to be as definite as the *Jensen* line ultimately became, but obviously, without 45 years of litigation.

Petitioners respectfully submit that their proposed maritime employment status test provides such a definitive line, one that is faithful to the statute, the legislative history and to *Caputo*. We commend it to the Court.

REPLY TO RESPONDENTS JUDICIAL DEFERENCE ARGUMENTS

Respondents urge that principles of "liberality" and deference to the administrative agency should control the result in these cases, but the authorities presented are not in point on the present issue of the extent of federal coverage. The original Brief for Petitioners (at pp. 41-49) deals with these contentions in a manner not challenged by the Respondents, and a recent development from the Benefits Review Board further emphasizes the inapplicability of any principle of deference to the administrative agency. In November, 1978, the Board held that the presumption of the Act, 33 U.S.C. § 920 (a), is inapplicable to the question of employee status under Section 2(3) of the Act, 33 U.S.C. § 902(3). *Sedmak v. Perini North River Associates*, 9 B.R.B.S. 378, 382-383 (November 30, 1978). Relying on the *Dellaventura* and *Stockman* decisions cited by Petitioners at p. 47 n.81 of their original Brief, the Board held the

14. The federal diversity statute is a classic example where arbitrariness is a virtue. Imagine the chaos in the diversity jurisdiction cases if the statute said "approximately" \$10,000, until the Court drew a "Jensen" line.

presumption to be inapplicable to the "threshold issue of coverage, such as status under Section 2(3), in the context of these cases," 9 B.R.B.S. at 383. Indeed, the Federal Respondent itself is apparently of two minds on this point, for although the presumption is raised on the coverage issue at page 35 of its Brief on the merits in No. 78-425, the inapplicability of the presumption was in effect acknowledged at p. 3 n. 2 of the Memorandum for the Federal Respondent in response to the Petition in No. 76-641, the first time these cases came to the Court.

Thus the Board and the Federal Respondent have parted company on the fundamental question of how this jurisdiction issue should be approached, and in the process have left the Court of Appeals below wholly without any administrative underpinning for its reliance on the allegedly "binding" force of the presumption. Cf. 539 F.2d at 541, Pet. App. p. 42. The allegedly consistent administrative treatment of this jurisdiction issue is therefore markedly impaired, and the Federal Respondent's deference argument is dramatically undercut by the absence of unanimity within the administrative structure.

In any event, the Respondents' make weight arguments of liberality, presumption and deference are inapplicable to the present jurisdictional/coverage question of statutory interpretation. Generally, the opinions in *Dellaventura*, 544 F.2d at 47, and *Stockman*, 539 F.2d at 269, explain why these concepts should not apply. Specifically, and in reply to the Respondents' briefs, the Federal Respondent misuses the "liberal construction" argument (and in so doing exposes the bootstrap character of his argument). The *Calbeck* and *Henderson* cases cited by the Federal Respondent are both navigable waters

cases, written in the context of the gap-filling function of the original Act. Cf. *Caputo*, 432 U.S. at 258. Liberal construction is not an appropriate tool for jurisdiction/coverage purposes, especially where pre-emption of the state remedy may be implied, as illustrated at pp. 41-42 of Petitioner's original Brief. The inapplicability of the presumption is illustrated by the Benefits Review Board's recent holding discussed above. The cases cited by the Federal Respondent on the judicial deference issue deal with matters of policy and discretionary balance, *N.L.R.B. v. Iron Workers*, or interpretation of an administrative regulation, *Udall v. Tallman*, or have ample demonstration of legislative intention without the deference principle, *Griggs v. Duke Power Co.*, *Trafficante v. Metropolitan Life*, *Board of Governors v. First Lincolnwood Corp.* ("especially when Congress has refused to alter the administrative construction, * * * particularly when that construction accords with well-established Congressional goals", 47 L.W. pp. 4052, 4053). Finally, the Federal Respondent quotes only a portion of this Court's recent comment on the deference theory from *International Brotherhood of Teamsters v. Daniel*, ____ U.S.____, 47 L.W. 4135, 4138 n. 20 (1979). (Br. p. 36 n. 22). Immediately following the language quoted by respondent, the Court went on to observe, and hold, that " * * * this deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history." 47 L.W. at 4138 n. 20.

CONCLUSION

In view of the fact that claimant Ford and claimant Bryant were not engaged in maritime employment, Pe-

tioners respectfully pray that the Court reverse the decisions of the court below and hold that these claims are not covered by the Longshoremen's Act as amended in 1972.

Respectfully submitted,

E. D. VICKERY
W. ROBINS BRICE
3710 One Shell Plaza
Houston, Texas 77002
713/224-8380

Attorneys for Petitioners

Of Counsel:

ROYSTON, RAYZOR,
VICKERY & WILLIAMS
Houston, Texas

ADDENDUM A

September 14, 1977

Clerk, U. S. Court of Appeals
Federal Courthouse
10th and Main Streets
Richmond, Virginia 23219

Re: *I.T.O. Corporation of Baltimore, et al.*
v. Adkins — No. 75-1051

Dear Sir:

I wish to advise the Court that I.T.O. Corporation of Baltimore and Liberty Mutual Insurance Company have no objection to the entry of an order to the effect that, in view of the Supreme Court's decision in *Northeast Marine Terminal, Inc. v. Caputo*, 432 U.S. ___, their Petition for Review in this case is denied and the order of the Benefits Review Board is affirmed. This will dispose of the instant case.

I am informed by attorneys for the United States and for Mr. Adkins that they concur in this disposition.

Very truly yours,

DAVID R. OWEN

DRO/bb

cc: William J. Kilberg, Esq.
Amos I. Meyers, Esq.
Thomas D. Wilcox, Esq.
Donald A. Krach, Esq.
John B. King, Jr., Esq.
Thomas W. Gleason, Jr., Esq.

EXCERPT FROM JOINT APPENDIX
 NO. 75-1051—UNITED STATES COURT OF
 APPEALS FOR THE FOURTH CIRCUIT
 I.T.O. CORP. OF BALTIMORE, ET AL V.
 WILLIAM T. ADKINS, ET AL
 pp. App. 22 - App. 23

APP. 22

(17) WILLIAM T. ADKINS,

was called as a witness in his own behalf, and having been first duly sworn by the Notary Public, was examined and testified as follows:

DIRECT EXAMINATION

* * * * *

(17) (Judge Benn) I would like to know his date of birth?

(The Witness) January 20, 1928.

By Mr. Meyers:

* * * * *

(18) Q. What kind of an education do you have? A. Fifth grade.

* * * * *

(18) Q. Now, how long have you worked on the waterfront? A. 11 years.

Q. And will you tell His Honor when you began working on the waterfront and what kind of work you did? A. When I first started I was doing the same kind

of work I am doing now, but I was in a different local, 1429. So then—

(Judge Benn) But the record doesn't reflect what you were doing there. So, would you state that?

(The Witness) Sir?

(Judge Benn) You didn't answer the question about the type of work you were doing. You said it was the same type of work you are doing now.

(18) (The Witness) Operating a fork lift.

By Mr. Meyers:

Q. Did you also work aboard ship? (19) A. I worked on the ship and I worked on the piers, sometimes, you

APP. 23

know. You can't work both at the same time. And on the weekends, maybe they would need extra tractor drivers or something, so I would work on a ship.

Q. Well, you worked and you were a member of what union? A. ILA.

Q. What number? A. 333.

Q. Now, it's 333. A. It was 858 first.

Q. It was 858? A. They took me out of 1429 in 1968, and had me transferred over to the 858 local.

Q. And 1429 was, well, what kind of union was it, ship ceilers? A. Yes, they worked ships too.

Q. And then, you changed over to the longshoremen union? A. Right, 858 in 1966.

Q. And during that time your employment was both aboard ship and on the pier? A. Right, anywhere the work is at, that's where I worked.

Q. On board ship, what kind of work did you do? A. Drive a tractor the same as I do on the pier.

(20) Q. The very same type work? A. That's right.

Q. Was it work that entailed loading and unloading of ships? A. Yes, right, right.

* * * * *

(20) Q. You know the operation on the waterfront, tell us what work you were doing and what did it pertain to? What type of work? A. Well, the freight was on the pier and we was taking it up and putting it on ~~the~~ truck going out, loading the truck.

Q. Where did the freight come from? A. From out of the container off the ship.

(21) Q. It came off the ship? A. Right.

Q. And is that the kind of work you were doing on the date of your injury? A. I was loading the truck.

Q. And where did the freight come from. A. It come out of the container.

No. 78-425

Supreme Court, U.S.

FILED

JAN 11 1979

IN THE SUPREME COURT
OF THE UNITED STATES

MICHAEL RODAK, JR., CLERK

October Term, 1978

P.C. PFEIFFER COMPANY, INC. AND
TEXAS EMPLOYERS' INSURANCE ASSO-
CIATION, Petitioners,

vs.

DIVERSON FORD AND DIRECTOR, OFFICE
OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR.

AYERS STEAMSHIP COMPANY AND TEXAS
EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

vs.

WILL BRYANT AND DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF
OF CARGILL, INC. AS AMICUS CURIAE
IN SUPPORT OF PETITIONERS

DENNIS LINDSAY
ROBERT BABCOCK
1331 S. W. Broadway
Portland, Oregon 97201

LINDSAY, NAHSTOLL, HART, NEIL & WEIGLER,
Of Counsel.

SUBJECT INDEXPage

MOTION FOR LEAVE TO FILE BRIEF OF CARGILL, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS	v
BRIEF OF CARGILL, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS	1
STATEMENT OF INTEREST OF AMICUS CURIAE CARGILL, INC.	2
SUMMARY OF ARGUMENT	7
ARGUMENT	9
Only Amphibious Workers Have A Potential Shore-Side LHWCA Benefit Entitlement	9
A Worker Is "Amphibious" Only If The Potential Range Of Job Assignments In The Employment Followed By The Worker At The Time Of In- jury Requires At Least Some Work On Navigable Waters	23
CONCLUSION	29

INDEX OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<u>Brady-Hamilton Stevedore Co. v. Herron</u> , 568 F.2d 137 (9th Cir. 1978)	15-16, 21
<u>Cargill, Inc. v. Powell</u> , 573 F.2d 561 (9th Cir. 1977), Petition for Cert. Pending, No. 77-1453	2-3, 9, 16-17, 22, 24, 25, 28
<u>Conti v. Norfolk & W. Ry. Co.</u> , 566 F.2d 890 (4th Cir. 1977)	18-21
<u>I.T.O. Corp. v. Benefits Review Board</u> , 542 F.2d 903 (4th Cir. 1976) (en banc), vacated and remanded in part sub.nom. <u>Adkins v. I.T.O. Corp.</u> , 433 U.S. 904, on remand, 563 F.2d 646 (4th Cir. 1977)	21
<u>Kossick v. United Fruit Co.</u> , 365 U.S. 731 (1961)	30
<u>Northeast Marine Terminal Co. v. Caputo</u> , 432 U.S. 249 (1977)	8, 11, 12- 13, 14, 15, 18, 19, 21, 23, 24-25, 29
<u>Nogueira v. New York, N.H. & H.R. Co.</u> , 281 U.S. 128 (1930)	10
<u>Pennsylvania R. Co. v. O'Rourke</u> , 344 U.S. 334 (1953)	10

INDEX OF AUTHORITIES (cont.)

	<u>Page</u>
<u>State Industrial Commission v. Nordenholt Corp.</u> , 259 U.S. 263, (1922)	10
<u>Thibodeaux v. Atlantic Richfield Co.</u> , 580 F.2d 841 (5th Cir. 1978)	12, 21
<u>Weyerhaeuser Co. v. Gilmore</u> , 528 F.2d 957 (1976), cert.den. 429 U.S. 868, 97 S.Ct. 179, 50 L.Ed.2d 148 (1976)	20
<u>Voris v. Eikel</u> , 346 U.S. 328 (1953)	22
<u>Statutes</u>	
33 USC §902(2)	26
33 USC §902(3)	4, 7, 9
33 USC §902(4)	9
33 USC §903	20
33 USC §903(a)	7
<u>Other Authorities</u>	
H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 11 (1972)	10-11
S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13 (1972)	10-11
<u>Larson, The Law of Workmen's Compensation</u> , Vol. IB, (1978)	27

No. 78-425

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1978

P.C. PFEIFFER COMPANY, INC. AND
TEXAS EMPLOYERS' INSURANCE ASSO-
CIATION, Petitioners,

vs.

DIVERSON FORD AND DIRECTOR, OFFICE
OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR.

AYERS STEAMSHIP COMPANY AND TEXAS
EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

vs.

WILL BRYANT AND DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR.

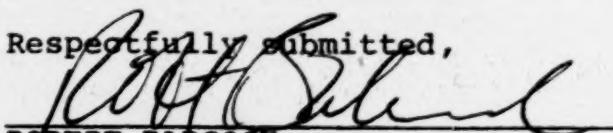
ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF
CARGILL, INC. AS AMICUS CURIAE IN
SUPPORT OF PETITIONERS

Pursuant to Rule 42(3) of the Supreme Court Rules, Cargill, Inc. respectfully moves for leave to file the attached Brief as Amicus Curiae in support of the Petitioners.

Counsel for all parties have orally consented to the filing of this Amicus Curiae Brief. The written consents required by Rule 42(2) have been prepared by all parties and mailed to counsel for Cargill, Inc. Delivery of the written consents has, however, been delayed by current weather conditions. All written consents will be submitted to the Clerk as soon as they have been received by Cargill, Inc.

Respectfully submitted,


ROBERT BABCOCK
1331 S. W. Broadway
Portland, Oregon 97201
(503) 226-1191
Attorney for Cargill, Inc.

Of Counsel:
LINDSAY, NAHSTOLL, HART, NEIL & WEIGLER

No. 78-425

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1978

P.C. PFEIFFER COMPANY, INC. AND
TEXAS EMPLOYERS' INSURANCE ASSO-
CIATION, Petitioners,

vs.

DIVERSON FORD AND DIRECTOR, OFFICE
OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR.

AYERS STEAMSHIP COMPANY AND TEXAS
EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

vs.

WILL BRYANT AND DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF CARGILL, INC. AS AMICUS
CURIAE IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF
AMICUS CURIAE CARGILL, INC.

Cargill, Inc. buys and sells grain.

It is a grain merchant. Most of the grain sold by Cargill is exported overseas.

Some of the grain sold by Cargill is transported to purchasers located within the United States.

The interest of Cargill, Inc. in this case arises from the fact that it is party to a case presently pending in this Court and presenting the same issue, namely, whether non-amphibious workers participating in shore-side cargo handling tasks which are not essential elements of vessel loading or unloading are engaged in maritime employment and therefore entitled to the benefits of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA). Cargill, Inc. v. Powell, 573 F.2d 561 (9th Cir. 1977), petition

for cert. pending, No. 77-1543.

In Powell, the United States Court of Appeals for the Ninth Circuit concluded that claimant Powell was not entitled to the benefits of the LHWCA because (a) during nearly seven months of continuous employment with Cargill, Inc., claimant Powell neither performed nor was subject to assignment to "genuine maritime work", and (b) claimant Powell's continuous non-maritime employment with Cargill, Inc. foreclosed his claim that he continued to practice and to be entitled to the benefits due workers who continued to spend at least part of their working days in genuine maritime work.

Despite the Ninth Circuit's clear holding that nearly seven months of continuous non-maritime work removed claimant Powell from membership in the long-shoring occupational group, the Federal

Respondent Director, Office of Workers' Compensation Programs, has continued to argue that Powell was a "longshoreman by trade", suggesting that Powell

". . . could be held to fall within the coverage of the Act on that basis alone, without the need to reach the question whether his activities in unloading grain from land transportation constituted 'longshoring operations' within the meaning of Section 2(3) of the Act." (Memorandum for the Federal Respondent on the Petition for Certiorari, p. 5)

Cargill, Inc. disputes the Federal Respondent Director's view that Powell remained a "longshoreman by trade" and suggests that the LHWCA entitlement of both Powell and Respondents Ford and Bryant requires this Court's determination of whether shore-side cargo handling activities by non-amphibious workers constitute "maritime employment" within the meaning of Section 2(3) of the LHWCA.

The resolution of this proceeding is of substantial importance to Cargill, Inc. and to the owners and operators of all other grain elevators located adjacent to the various navigable waters of the United States. The vast majority of the work performed at the elevators operated by Cargill and others is directed to the operation and maintenance of various types of grain handling equipment. The workers performing these tasks belong to many different labor organizations, including unions of teamsters, grain handlers, and longshoremen. While employed by Cargill, Inc., these workers--regardless of their union affiliation--do not assist directly in the loading of the vessels carrying the grain to overseas purchasers. All of those necessary direct vessel loading activities are performed by workers employed by independent contract stevedor-

ing companies.

Because all of the direct vessel loading operations at Cargill, Inc.'s elevators are performed by contract stevedoring companies, Cargill, Inc. was not historically subject to the pre-amendment LHWCA and, therefore, did not participate in the legislative process leading to the 1972 amendments. A determination that Respondents Ford and Bryant and Petitioner Powell are entitled to LHWCA benefits would have the effect of bringing within the ambit of the LHWCA an entire industry not even considered by Congress during its 1972 deliberations.

Through its participation in this proceeding, Cargill, Inc. seeks to persuade this Court to reject the Fifth Circuit Court of Appeals' analysis of the LHWCA coverage provisions, to prevent the unintended expansion of the LHWCA to the

grain handling industry, and to resolve the current coverage uncertainties by specifically ruling that LHWCA benefit entitlement does not extend to non-amphibious workers injured while engaged in shore-side cargo handling activities which, although performed at facilities adjoining navigable waters, are not essential elements of vessel loading or unloading.

SUMMARY OF ARGUMENT

LHWCA benefit entitlement extends to all persons "engaged in maritime employment" who sustain injury either upon the navigable waters of the United States or the several specified adjoining shore-side locations. (33 USC §§902(3) and 903(a))

Long standing precedent, the legislative intent underlying Congress' 1972 amendments, and this Court's decision in

Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977) all support the view that LHWCA coverage does not encompass non-amphibious workers engaged in shore-side cargo handling operations which, although part of the process of moving cargo between sea and land transportation, are not essential elements of loading or unloading vessels.

The determination of whether a particular employment is or is not "amphibious" should depend only upon the nature of the worker's activities while employed by the company upon whom he seeks to impose compensation liability. A prior "amphibious" occupation should not serve as the basis for imposing LHWCA liability upon employers who never employ workers in activities requiring at least partial performance on navigable waters.

ARGUMENT

Only Amphibious Workers Have A Potential Shore-Side LHWCA Benefit Entitlement^{1/}

The Federal Respondent Director advances the view that "maritime employment" --the LHWCA's prerequisite to both the employee's entitlement and the employer's exposure^{2/}--

1/ Neither this proceeding nor Powell v. Cargill, Inc., supra, involves the compensability of injuries occurring during cargo handling activities which have moved ashore as a result of the advent of modern cargo handling techniques such as containerization and increased usage of LASH-type vessels. Ford, Bryant, and Powell were all injured during "old-fashioned" shore-side work. This brief deals only with the compensation entitlement of workers involved in these old-fashioned labors.

2/ 33 USC §902(3) defines "employee" as "Any person engaged in maritime employment. . . ."

33 USC §902(4) defines "employer" as "An employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States. . . ."

". . . includes all physical tasks performed on the waterfront, and particularly those tasks necessary to the transfer of cargo between land and water transportation." (Memorandum for Federal Respondent on Petition for Writ of Certiorari, pp. 3, 4)

This view is contrary to decisions of this Court limiting "maritime employment" as used in the LHWCA to only that employment requiring at least partial performance on navigable waters. State Industrial Commission v. Nordenholt Corp., 259 U.S. 263 (1922); Nogueira v. New York, N.H. & H.R. Co., 281 U.S. 128 (1930); Pennsylvania R. Co. v. O'Rourke, 344 U.S. 334 (1953).

In enacting the 1972 amendments, Congress clearly intended to invoke the traditional definition of "maritime employment".

". . . The Committee has no intention of extending coverage under the Act to individuals who

are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part, in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters." (S. Rep. No. 92-1125, 92d Cong., 2d Sess., 13; H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., 11 (1972))

Recognition that Congress intended continued usage of the traditional "maritime employment" definition is implicit in this Court's decision in Northeast Marine Terminal Co. v. Caputo, supra, and the post-Caputo decisions issued by the United States Courts of Appeal for the Fourth and Ninth Circuits. The decision of the Fifth Circuit awarding LHWCA benefits to claimants Ford and Bryant stands alone in clearly rejecting the traditional "maritime employment" definition.^{3/}

^{3/} There is strong indication that the

Northeast Marine Terminal Co. v. Caputo:

In reaching the decision that claimant Blundo (the checker of containerized

Ford/Bryant decision does not represent the unanimous view of even the Fifth Circuit Court of Appeals. In Thibodeaux v. Atlantic Richfield Co., 580 F.2d 841 (5th Cir. 1978), a decision issued subsequent the one here at issue, Circuit Judges Clark, Fay, and Vance were required to determine the LHWCA eligibility of a deceased oilfield construction and maintenance worker. In affirming the trial court's summary judgment against the decedent's widow, the Court noted that

". . . as a matter of law the deceased was not engaged in 'maritime employment' as measured by the alternative tests of status sanctioned in Caputo. There is no substantial evidence that the deceased spent at least part of his time 'indisputably' as a longshoreman, harbor worker, ship repairman, ship builder, or ship breaker. . . . The deceased simply is not the amphibious worker sought to be protected by the 1972 amendments to the LHWCA because his work was performed on land. . . ." (580 F.2d 841, at 845; emphasis added.)

cargo) was entitled to LHWCA benefits, this Court concluded that the LHWCA "status" test was met because Blundo's work was

". . . clearly an integral part of the unloading process as altered by the advent of containerization." (432 U.S. 249, 271) ^{4/}

In considering claimant Caputo's "status", however, this Court did not conclude that Caputo's work--the loading of goods already unloaded from a ship into a delivery truck--fell into the "maritime employment" category. Rather, look-

^{4/} Once again, this proceeding does not involve claims to LHWCA benefits by workers subject to what this Court identified as the first "dominant theme" underlying the 1972 amendments, i.e.,

". . . Congress' decision to extend the coverage shoreward. . . [in] recognition that the 'advent of modern cargo-handling techniques' had moved much of the longshoremen's work off the vessel and onto the land." (432 U.S. 249, 269-70)

ing to the second "dominant theme" underlying the 1972 amendments, this Court extended LHWCA benefit entitlement to Caputo because, although his "moment-of-injury" work was non-maritime, the range of potential jobs to which he could have been assigned while employed by Northeast Marine Terminal included the clearly maritime work of loading and unloading vessels.

(432 U.S. at 274) Because of that potential job assignment range, a determination that Caputo's truck-loading activities were not covered by the LHWCA would

". . . exclude him from the Act's coverage in the morning but include him in the afternoon . . . [and] . . . revitalize the shifting and fortuitous coverage that Congress intended to eliminate." (432 U.S. at 274)

This potential revitalization of a "shifting and fortuitous coverage" would have thwarted Congress' clear intent ". . . to provide continuous

coverage throughout their employment to these amphibious workers who, without the amendments, would have been covered only for part of their activity." (432 U.S. at 273)

In short, Caputo received LHCWA benefits because he was "amphibious" and despite the implicit finding that the work being performed by him at the time of his injury was non-maritime.

Post-Caputo Decisions Of The United States Courts of Appeal:

In Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1978), coverage was afforded because the employer conceded that claimant Herron was engaged in shipboard longshoring activities during at least a portion of his working day, and because the Benefits Review Board's conclusion that a gearlockerman's function^{5/} was an integral part of

^{5/} Gearlockermen work on a daily basis, responsible for repairing, maintaining,

longshoring operations and therefore "maritime employment" was

"... supported by evidence in the record that Herron was required at times to work aboard ships and even in the hold at tasks directly related to loading and unloading cargo." (568 F.2d at 140)

The findings implicit in Herron:

(a) Shore-side work incidental to actual loading and unloading activities is not "maritime employment"; and (b) An injury sustained by a person performing such incidental work is covered under the LHWCA only if the worker himself at times works aboard ship and is, therefore, amphibious.

The conclusions implicit in Herron became express in the Ninth Circuit's subsequent decision in Powell v. Cargill,

refueling, and inspecting the equipment housed in the stevedore's gearlocker, and for transporting that equipment between the locker and the pier. (568 F.2d at 139)

Inc., supra.

Powell was injured while unloading an incoming rail car bringing grain to Cargill's waterfront export facility. In denying his claim to LHWCA benefits, the Ninth Circuit first found Powell's "moment-of-injury" work to be non-maritime,^{6/} and

6/ ". . . In the past it might have been customary for Powell to hire himself out to employers on an irregular basis, and some of his work may have been indisputably maritime. At the time of the accident, however, Powell had been employed by the same employer performing the same duties for about seven months. Not once during that tenure was he called on to assist directly in the loading or unloading of any ship, nor is there any evidence that such genuine maritime work was even contemplated. Powell's attention was directed to the unloading of rail cars as they arrived at the elevator. He had no involvement whatsoever with the loading and unloading of the ships themselves. His work was more oriented to the rails than to the sea." (573 F.2d at 564)

then determined that coverage was not nevertheless present because Powell was not amphibious.

"The policy pointed to by the Supreme Court in Northeast Marine Terminal to explain Congress' extension of the Act to employees who spend a part of their working day in non-maritime activity cannot support coverage for Powell. Having served seven months of continuous, non-maritime employment, with no indication that termination of that employment was contemplated, Powell cannot now claim that he was subject to the 'shift-ing and fortuitous coverage' in a single workday that concerned the Supreme Court in Northeast Marine Terminal." (573 F.2d at 564)

In Conti v. Norfolk & W. Ry. Co.,

566 F.2d 890 (4th Cir. 1977), the LHWCA "status" issue arose when the employer, against whom three injured workers sought Federal Employers Liability Act damages, argued that the LHWCA provided the workers' exclusive remedy.

The Fourth Circuit rejected the employer's defense, finding that

(a) Shore-side tasks essential to the transfer of cargo from land to water transportation were not "maritime employment" (566 F.2d at 895); and

(b) Workers engaged in non-maritime cargo handling activities are entitled to LHWCA protection only if they are amphibious, i.e., only if they spend at least some of their time in activities which would have been covered under the pre-amendment Act. (566 F.2d at 895)

The Fourth Circuit's reading of the LHWCA and Caputo is in complete accord with the views of the Ninth Circuit and the arguments here advanced by Amicus.

"To us the nub of the Court's decision is that an employee who is not engaged in 'an integral part of the unloading process' will not fall within the coverage of the Act unless his occupation is of a traditional mari-

time nature. This was the construction placed upon the statutory language by the Ninth Circuit in Weyerhaeuser Co. v. Gilmore, 528 F.2d 957, 961 (1976), cert. denied 429 U.S. 868, 97 S.Ct. 179, 50 L.Ed.2d 148 (1976):

'We hold that for an injured employee to be eligible for federal compensation under [the Act], his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to "traditional maritime activities involving navigation and commerce on navigable waters," with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in §903 [citations omitted].'

"It is clear that in the cases before us the occupations of the plaintiffs were not of a traditionally maritime nature, but on the contrary were those traditionally associated with railroading. Their tasks and responsibilities with respect to the unloading of the coal from the hopper cars would have been the same at an inland terminal as they were at Lambert's Point, and the sophisticated automation of the facilities

at the latter terminal should not obscure the basic fact that the plaintiffs were engaged in unloading a coal train, not loading a vessel. We find nothing in the Amendments or the legislative history to indicate that under these circumstances the Congress intended to transfer the redress of such injured railroad workers from the FELA to the Longshoremen's Act.

"Since we agree with the District Court that the plaintiffs were not engaged in maritime employment at the time of their injuries, the judgments are affirmed." (566 F.2d at 895) ^{7/}

The careful analyses of Caputo provided by the United States Courts of Appeal for the Fourth, Fifth and Ninth Circuits in Conti, Thibodeaux, Herron, and

^{7/} The Conti decision seriously undermines the continuing vitality of the Fourth Circuit's earlier decision in I.T.O. Corp. v. Benefits Review Board, 542 F.2d 903 (4th Cir. 1976) (en banc), vacated and remanded in part sub.nom. Adkins v. I.T.O. Corp., 433 U.S. 904, on remand, 563 F.2d 646 (4th Cir. 1977), holding that a worker engaged in loading a truck with previously containerized cargo was entitled to LHWCA benefits.

Powell, fully comply with the requirement that the LHWCA

". . . be liberally construed in conformance with its purposes, and in a way which avoids harsh and incongruous results." (Voris v. Eikel, 346 U.S. 328, 333 (1953))

and with the purposes underlying the 1972 amendments.

The Fifth Circuit's award of benefits to non-amphibious shore-side cargo handlers must be reversed unless the 1972 amendments are to ensnare literally hundreds of employers, such as Amicus, who conduct no shipboard activities and who, therefore, played no role in and receive no benefits from the 1972 legislative process.

Amicus urges this Court to specifically rule that workers engaged in shore-side cargo handling activities which are

not "essential elements"^{8/} of unloading or loading a vessel are entitled to LHWCA protection only if they are "amphibious".

A Worker Is "Amphibious" Only If The Potential Range Of Job Assignments In The Employment Followed By The Worker At The Time Of Injury Requires At Least Some Work On Navigable Waters

The Federal Respondent Director seeks to characterize as "amphibious" any worker who has historically worked aboard ships in loading or unloading operations, even if that work was performed for an employer other than the one upon whom the worker seeks to impose LHWCA liability.^{9/}

^{8/} In Caputo, this Court noted that the "essential elements" of vessel unloading included (a) taking cargo out of the hold, (b) moving it away from the ship's side, and (c) carrying it immediately to a storage or holding area. (432 U.S. at 267)

^{9/} This attempt is clear from the Federal Respondent Director's repeated characterization of claimant Powell as a "longshoreman by trade" despite the Ninth Circuit's clear conclusion that nearly

In short, the Federal Respondent Director seeks to call "amphibious" any worker who, during the long span of a working career, has been involved in shipboard activities.

The Ninth Circuit properly and specifically rejected this approach in deciding that claimant Powell was not amphibious:

". . . Similarly, it is not relevant that Powell is a registered member of the International Longshoremen's and Warehousemen's Union, or that he worked in virtually all phases of the long-shoring operation for every employer in the Port of Portland. We cannot concern ourselves with the entire span of a claimant's career." (573 F.2d at 563, Fn. 2)

This Court found claimant Caputo "amphibious" because he was subject to shipboard assignment on the day of his injury and during the course of his employ-

seven months of continuous employment as a shore-side grain handler foreclosed Powell's attempt to claim benefits payable to others who remained in the "long-shore" trade and continued to face shipboard hazards on a regular basis.

ment with Northeast Marine Terminal Co. (432 U.S. at 273-74)

The Ninth Circuit found Powell to be not "amphibious" because he was never subject to such assignments during seven months of employment with Cargill, Inc.

No court has yet decided the period of a worker's career which should be scrutinized when deciding whether he is or is not amphibious.

"This is not to say that an employee whose duties shifted from the maritime to the non-maritime over a period of time greater than a single workday is never covered by the LHWCA. We only note that in Northeast Marine Terminal, supra, the Supreme Court focused on an employee whose duties shifted throughout a single working day. We do not decide whether an employee whose duties shifted every week, or every month, may still qualify under the Act. That determination must be left to development in future cases." (573 F.2d at 564, Fn. 4)

Whatever specific period of time is developed in future cases, Amicus urges

this Court to specifically limit the permissible scrutiny to the period of the worker's current employment with the employer upon whom he seeks to impose LHWCA liability.

In cases involving persons employed by an individual employer for continuous periods greater than a single workday, the permissible scrutiny might well extend for the entire employment period. In cases involving daily or single-job hiring--a sizeable proportion of waterfront work--the scrutiny should be limited to the specific day or job.

The fundamental prerequisite of all workers' compensation systems, including the LHWCA, is that compensation entitlement and liability arise only in cases of accidental injury or death "arising out of and in the course of employment."

(33 USC §902(2)) The fact that the "em-

ployment" out of which the injury or death must arise is that with the employer upon whom the employee seeks to impose compensation liability is equally fundamental.

"Compensation law, however, is a mutual arrangement between the employer and employee under which both give up and gain certain things. Since the right to be adjusted are reciprocal rights between employer and employee, it is not only logical but mandatory to resort to the agreement between them to discover their relationship. To thrust upon a worker an employee's status to which he has never consented would not ordinarily harm him in a vicarious liability suit by a stranger against his employer, but it might well deprive him of valuable rights under the compensation act, notably the right to sue his own employer for common law damages." (Larson, The Law of Workmen's Compensation, Vol. 1B, §47.10, pp.8-147, 148 (1978))

The broadening of the permissible scrutiny period suggested by the Federal Respondent Director beyond the worker's current employment would violate these

basic premises of workers' compensation law and would prevent any employer's accurate assessment of his own compensation risks. If the Federal Respondent Director's position is adopted by this Court, a worker's characterization as "amphibious" and hence his entitlement to LHWCA benefits for injuries sustained during non-maritime work would be wholly dependent upon the worker's former employments and would, therefore, create wholly "f ortuitous" benefit disparities among persons performing the same work for the same employer.

In cases such as Powell, involving workers belonging to expanding labor organizations, compensation liability of employers in the area to which the union's jurisdiction has expanded would depend upon the worker's activities with former employers and would, therefore, make the

LHWCA dependent upon those same vagaries of union jurisdiction which this Court has stated to be unrelated to the purposes of the LHWCA. (432 U.S. at 269, Fn. 30)

CONCLUSION

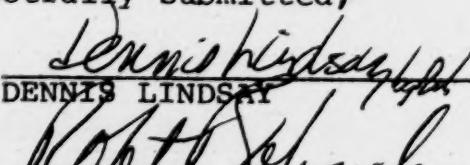
Amicus urges this Court to reject the Fifth Circuit's approach and to conclude that the LHWCA affords protection for shore-side injuries to persons engaged in old-fashioned cargo handling activities only if (a) the activities are "essential elements" of the vessel loading or unloading process, or (b) the activities are performed by workers whose current employment is amphibious.

The position advanced by the Federal Respondent Director and in large part adopted by the Fifth Circuit goes far beyond Caputo and the history underlying the 1972 amendments.

Acceptance of the Federal Respondent

Director's position would extend the LHWCA's coverage to all cargo handling work performed within the Act's "situs" requirements, would effectively erase the "status" requirement incorporated into the LHWCA in 1972, and would bring within the LHWCA's reach many industries, including that represented by Amicus, having none of that "genuinely salty flavor"^{9/} long thought necessary to be considered "maritime".

Respectfully submitted,


 DENNIS LINDSAY

 ROBERT BABCOCK

1331 S. W. Broadway
 Portland, Oregon 97201
 (503) 226-1191
 Attorneys for Amicus Curiae
 Cargill, Inc.

Of Counsel:

LINDSAY, NAHSTOLL, HART, NEIL & WEIGLER

^{9/} Kossick v. United Fruit Co., 365 U.S. 731 (1961).

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of January, 1979, I served three true and correct copies of the MOTION FOR LEAVE TO FILE AND BRIEF OF CARGILL, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS on:

E.D. VICKERY
 Suite 3710, One Shell Plaza
 Houston, Texas 77002
 Attorney for Petitioners

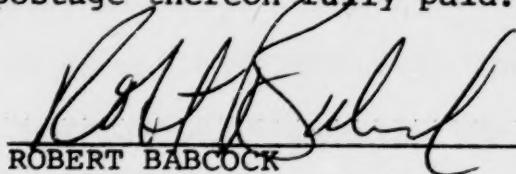
WADE H. McCREE, JR.
 Solicitor General
 U.S. Department of Justice
 Washington, D.C. 20530
 Attorney for Federal Respondent
 Director, Office of Workers'
 Compensation Programs

ARTHUR SCHECHTER
 Suite 2080, Two Shell Plaza
 Houston, Texas 77002
 Attorney for Respondent Bryant

WELDON GRANGER
 5959 West Loop South
 Houston, Texas 77081
 Attorney for Respondent Ford

by placing said copies in sealed envelopes addressed as above shown; said envelopes were then deposited in the

United States Post Office at Portland,
Oregon, on the day last above mentioned,
with the postage thereon fully paid.



ROBERT BABCOCK
Of Attorneys for Amicus Curiae
Cargill, Inc.

MOTION FILED
JAN 10 1979

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-425

P. C. PFEIFFER CO., INC. AND
TEXAS EMPLOYERS' INSURANCE ASSOCIATION
Petitioners
v.

DIVERSON FORD AND DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS
Respondents

AYERS STEAMSHIP COMPANY AND
TEXAS EMPLOYERS' INSURANCE ASSOCIATION
Petitioners
v.

WILL BRYANT AND DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS
Respondents

**On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit**

**MOTION FOR LEAVE TO FILE AND BRIEF OF THE
NATIONAL ASSOCIATION OF STEVEDORES AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

THOMAS D. WILCOX

THOMAS D. WILCOX, P.C.
919 Eighteenth Street, N.W.
Washington, D.C. 20006

Attorney for
National Association of Stevedores,
Amicus Curiae

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-425

P. C. PFEIFFER CO., INC. AND
TEXAS EMPLOYERS' INSURANCE ASSOCIATION
Petitioners

v.

DIVERSON FORD AND DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS
Respondents

AYERS STEAMSHIP COMPANY AND
TEXAS EMPLOYERS' INSURANCE ASSOCIATION
Petitioners

v.

WILL BRYANT AND DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS
Respondents

On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE
NATIONAL ASSOCIATION OF STEVEDORES AS
AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 42(3) of the Supreme Court Rules, the National Association of Stevedores respectfully moves for leave to file the attached brief as *Amicus Curiae* in support of the petitioner. Counsel for the petitioners and the Federal Respondent have consented to the filing of this brief.

**STATEMENT OF INTEREST OF *AMICUS CURIAE*
NATIONAL ASSOCIATION OF STEVEDORES**

The National Association of Stevedores (NAS) is a nonprofit corporation incorporated on January 30, 1975 pursuant to the District of Columbia Non-profit Corporation Act, 29 D.C. Code 1001 *et seq.*, for the purpose of promoting, furthering and supporting the stevedoring and marine terminal industry in the United States, its territories and possessions. It is the corporate successor to the unincorporated association of the same name organized in the District of Columbia in 1933. It has been given tax exemption rulings by both the Government of the District of Columbia and the Internal Revenue Service. Sec. 1005(b) of Title 29 of the District of Columbia Code specifically provides that a non-profit corporation shall have the power to sue and be sued, complain and defend, in its corporate name.

The present membership of the NAS comprises 61 private marine terminal and stevedore employers doing business in ports on the nation's four seacoasts and the state of Hawaii. Based upon U.S. government manhour statistics for calendar year 1974 it is conservatively estimated that NAS member companies are responsible for over 70 percent of the industry's total manhours in all U.S. ports.

The member companies of the NAS employ the majority of U.S. longshore and privately employed marine terminal labor, some of whom may be entitled to federal Longshoremen's and Harbor Workers' Compensation Act,

(the "LHWCA"), 33 USC § 901 *et seq.* and some of whom may be subject to state workers' compensation laws. The NAS member companies are directly responsible for workers' compensation payments under both federal and state law either as self-insureds or through insurance carriers licensed by the U.S. Department of Labor or state insurance commissions.

Thus, the interest of the NAS and its member companies in the outcome of any litigation concerning the scope of benefits and jurisdiction of the federal LHWCA is second to none, except the injured worker.

LHWCA insurance costs, be it premiums paid to licensed carriers, or benefits paid directly to employees, are the second largest cost of a private marine terminal operator or stevedore company, exceeded only by direct payroll expenses. Any decision by this or any other Court or administrative body as to which employee is entitled to federal LHWCA benefits and the amount of such benefits, has a direct and substantial economic impact upon each and every member of the NAS. For these reasons, the NAS has been authorized and directed by its member companies to appear on their behalf in all appropriate Courts until such matters are finally resolved. Pursuant to that mandate the NAS has participated as a party before the Benefits Review Board, U.S. Department of Labor and before the Fourth Circuit Court of Appeals. In addition, the NAS appeared as *amicus curiae* before the Second and Fifth Circuit Courts of Appeals and in this court in *Northeast Marine Terminal Corp. v. Caputo et al.*, 432 U.S. 249 (1977), and *Edmonds v. Compagnie Generale Transatlantique*, No. 78-479.

Amicus Curiae has examined the language and legislative history of the LHWCA and its 1972 amendments primarily in light of their impact upon stevedore employers who must pay compensation thereunder to injured

longshoremen such as the petitioners in these cases. *Amicus curiae* does not believe that the parties have considered the issue before this Court in precisely the same manner.

Amicus curiae therefore requests that this Court grant it leave to file the attached brief.

Respectfully submitted,

THOMAS D. WILCOX

THOMAS D. WILCOX, P.C.
919 Eighteenth Street, N.W.
Washington, D.C. 20006

Attorney for
National Association of Stevedores,
Amicus Curiae

TABLE OF CONTENTS

	Page
The Statute Involved	2
The Question Presented	3
Summary of Argument	3
Argument	5
The Legislative Purpose of the 1972 Amendments..	5
The Express Purpose or Intent of Congress	7
Shoreside Extension of Coverage	11
All Lines Move	15
The Real Unresolved Issue	18
An Unexpected Result of the Uncertainty—Loss of Job Opportunities	22
The Line Must Be Definitively Stated	24
Conclusion	28
Appendix	1a

TABLE OF AUTHORITIES

STATUTES	Page
Longshoremen's and Harbor Workers' Compensation Act, 33 USC § 901 <i>et seq.</i>	2, 3, 5
33 USC § 902(3)	2, 3, 6, 22
33 USC § 902(4)	2, 6, 22
33 USC § 903(a)	2, 6, 11
Public Law 92-576, 86 Stat. 1251 <i>et seq.</i>	2, 3, 5
REGULATIONS	
20 CFR 1918.3(1)	15
46 CFR 533.6(c)	15
CASES	
<i>Bogrowski v. American Export Lines, et al.</i> , 305 F.Supp. 432 (DCED Wis. 1969) reversed on other grounds, 440 F.2d 502 (7th Cir. 1970)	11
<i>Baltimore & PSB Co. v. Norton</i> , 283 U.S. 408 (1933)	6
<i>Conti v. Norfolk & Western Ry. Co.</i> , 566 F.2d 890 (4th Cir. 1978)	14
<i>Director, Office of Workers' Compensation Programs, et al. v. Rasmussen et al.</i> , U.S. Supreme Court Nos. 77-1465, 1481	6
<i>Edmonds v. Compagnie Generale Transatlantique, No. 78-479</i>	6
<i>Jamison v. Encarnacion</i> , 281 U.S. 635 (1930)	6
<i>Maher Terminals, Inc. v. Farrell</i> , 548 F.2d 476 (3rd Cir. 1977)	12
<i>Northeast Marine Terminal Company, Inc. v. Caputo et al.</i> , 432 U.S. 249 (1977)	passim
<i>Nacirema Operating Company v. Johnson</i> , 396 U.S. 212 (1969)	7, 14
<i>Noguiera v. New York, N.H. and H.R. Co.</i> , 281 U.S. 128 (1930)	15

TABLE OF AUTHORITIES—Continued

Page	
<i>Pennsylvania Railroad Co. v. O'Rourke</i> , 344 U.S. 344 (1953)	15
<i>Perdue v. Jacksonville Shipyards Inc.</i> , 539 F.2d 533 (5th Cir. 1976) vacated and remanded in part sub. nom. <i>P. C. Pfeiffer Company, Inc. et al. v. Diverson Ford et al.</i> , 433 U.S. 904 (1977), on remand, 574 F.2d 79 (5th Cir. 1978)	5, 14
<i>Texports Stevedore Co. v. Winchester</i> , 554 F.2d 245, reh. den. 561 F.2d 1213 reh. granted 569 F.2d 428 (5th Cir. 1978)	12
<i>Victory Carriers v. Law</i> , 404 U.S. 202 (1971)	7, 14
<i>Voris v. Eikel</i> , 346 U.S. 328 (1953)	6

AGENCY DECISIONS

<i>Carroll v. Hullinghorst Industries</i> , 7 BRBS 538 (1978)	12
<i>Davis v. American President Lines, Ltd.</i> , 7 BRBS (1978)	17
<i>Lewis v. Pittston Stevedoring Corp.</i> , 8 BRBS 321 (1978)	12
<i>Sargent v. Matson Terminals, Inc.</i> , 8 BRBS 564 (1978)	12
<i>Texports Stevedore Co. v. Winchester</i> , 6 BRBS 265 (1976)	12

OTHER AUTHORITIES

Activities of the Subcommittee on Compensation, Health and Safety for the 95th Congress, Congressional Record, November 9, 1978, pgs. E5959-61	19, 27, 1a
Economic Impacts of the U.S. Port Industry: An In-Put Out-Put Analysis of Water Borne Transportation, U.S. Department of Commerce, Maritime Administration (1978)	23
Grant Gilmore, Charles L. Black, Jr., <i>The Law of Admiralty</i> , Second Edition, The Foundation Press, Inc., 1975	25

TABLE OF AUTHORITIES—Continued

	Page
House of Representatives Report, 92-1441, 92nd Congress, 2nd Sess., 3 U.S. Code Cong. & Admin. News, 4698 <i>et seq.</i> , Senate Report 92-1125 92nd Cong. 2nd Session	<i>passim</i>
LHWCA Program Memorandum No. 58, Guidelines for Determination of Coverage of Claims under Amended Longshoremen's Act, Director, Office of Workers' Compensation Programs, U.S. Department of Labor (1977)	12, 20
Larson, The Conflicts Problem Between the Longshoremen's Act and State Workmen's Compensation Acts Under the 1972 Amendments, 14 Houston Law Review 287 (1977)	16, 25
Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act, Part 1, Subcommittee on Compensation, Health and Safety of the Committee on Education and Labor, House of Representatives, 95th Congress, U.S. Government Printing Office, 1977	18, 21, 23, 26
The Stevedore and Marine Terminal Industry of the United States, National Association of Stevedores (1974)	11
U.S. Department of Labor, Office of Workers' Compensation Programs Task Force Report, Longshore and Harbor Workers Compensation Program (1976)	19
U.S. Exports Transhipped Via Canadian Ports, U.S. Department of Commerce, Maritime Administration, 1978	22
Webster's Seventh New Collegiate Dictionary, G&C Merriam Company—1970	8

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-425

P. C. PFEIFFER CO., INC. AND
TEXAS EMPLOYERS' INSURANCE ASSOCIATION
Petitioners

v.

DIVERSON FORD AND DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS
Respondents

AYERS STEAMSHIP COMPANY AND
TEXAS EMPLOYERS' INSURANCE ASSOCIATION
Petitioners

v.

WILL BRYANT AND DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS
Respondents

On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF
STEVEDORES AS AMICUS CURIAE IN
SUPPORT OF PETITIONER

THE STATUTE INVOLVED

These cases involve the proper construction of sections 2(3), 2(4) and 3(a) of the Longshoremen's and Harbor Workers' Compensation Act, 33 USC § 902(3), 902(4) and 903(a) as amended by sections 2(a), (b) and (c) of Public Law 92-576, 86 Stat. 1251. Those sections, with the amendatory language in italics, now provide:

SEC. 2. (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

SEC. 2. (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

SEC. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, or any person engaged by the master to load or un-

load or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

THE QUESTION PRESENTED

Does the term "maritime employment" as used in section 2(3) of the LHWCA include employments which neither require nor permit a worker to work upon the navigable waters, a vessel on such waters, or in any other indisputably longshoring activity during the worker's daily employment for the employer for whom he is working?

SUMMARY OF ARGUMENT

These consolidated cases are the fourth in two years in which this Court must determine the meaning of the 1972 amendments (Public Law 92-576) to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (LHWCA), and the second in which the question is which employees are entitled to LHWCA benefits. Notwithstanding this Court's decision in *Northeast Marine Terminal Co., Inc. et al. v. Caputo et al.*, 432 U.S. 249 (1977) the line of demarcation between the federal LHWCA and state workers' compensation laws remains obscure, and that obscurity is the cause of much confusion and litigation.

One factor which has led to the widespread confusion and litigation is the lack of definition of terms which Congress used in the 1972 amendments, in particular "maritime employment." Another factor is the Federal Respondent's unrelenting efforts to attribute to Congress intents which nowhere appear in the legislative history nor are suggested by this Court in *Northeast, supra*. The Federal Respondent's Memorandum to this Court states

that the issue here is whether "maritime employment" includes all physical cargo handling in the waterfront area, but the Federal Respondent actually has applied a much broader interpretation of "maritime employment" which has extended LHWCA benefits to workers not engaged in physical cargo handling, on or off the "situs."

The resultant confusion has become so severe that many insurance carriers are unwilling to underwrite the LHWCA, and when LHWCA insurance is available the costs are becoming prohibitive. Because of all the uncertainties and inequities arising from the 1972 amendments a subcommittee of the House of Representatives of the 95th Congress has held extensive legislative oversight hearings on those amendments. Major revisions to the LHWCA were introduced in the 95th Congress (H.R. 13593 and H.R. 14068) and assuredly will again be introduced in the 96th Congress.

It is the belief of this *amicus curiae* that this Court can clear up some of the confusion by deciding in these cases where the line of demarcation between the coverage of the LHWCA and state workers' compensation law was moved by the Congress in 1972. Although Congress did not define the key terms of the 1972 amendments it did give certain guidelines as to which employees are to be covered by LHWCA benefits, and as to which employees and individuals are *not* to be covered by LHWCA benefits. It is clear from those Congressional statements of intent, both positive and negative, that Congress did not mean to extend LHWCA benefits to Diverson Ford and Will Bryant.

Amicus curiae submits that Congress intended "maritime employment" to include only the physical handling, and checking, of cargoes into and out of vessels on the navigable waters, and the physical handling, and checking, of such cargoes on terminals adjoining the navigable

waters by amphibious employees whose daily activities may require them to work on vessels or in other indisputably longshoring operations on the adjoining terminal area customarily used in vessel loading/unloading. *Amicus curiae* submits that Congress did not intend "maritime employment" to include activities in which the employee is neither required nor permitted to work upon the navigable waters in his daily employment for his employer.

Thus, longshoremen working on the vessel, members of the ship's gang working ashore, and amphibious cargo handlers like Ralph Caputo and Carmelo Blundo in *Northeast, supra* would, if injured, be entitled to LHWCA benefits for all of their daily employments for their employer. As to them the compensation system is uniform. Shoreside employees like Diverson Ford and Will Bryant, whose daily activities neither require nor permit them to go upon the navigable waters nor engage in indisputably longshoring activities would, if injured, be entitled to state workers' compensation benefits for all of their daily employments for their employer. As to them, there will also be a uniform compensation system.

ARGUMENT

The Legislative Purpose of the 1972 Amendments

In 1972 Congress amended the Longshoremen's and Harbor Workers' Compensation Act (the LHWCA), 33 USC § 901 *et seq.* by enacting Public Law 92-576, 86 Stat. 1251 *et seq.* on the last day of the second session of the 92nd Congress. These cases¹ are the fourth in which

¹ *Perdue v. Jacksonville Shipyards, Inc.*, 539 F.2d 533 (5th Cir. 1976) vacated and remanded in part sub nom. *P. C. Pfeiffer Company, Inc. et al. v. Diverson Ford et al.*, 433 U.S. 904 (1977), on remand 575 F.2d 79 (5th Cir. 1978).

this Court has granted a writ of certiorari to determine what Congress did in 1972, and the second in which this Court has had to determine what amended sections 2(3), 2(4) and 3(a) of the LHWCA 33 USC § 902(3), 902(4) and 903(a) really mean. Actually, these cases are the progeny of those presented to this Court in *Northeast Marine Terminal Company, Inc. et al. v. Caputo et al.*, 432 U.S. 249 (1972)² and concern the meaning of the still undefined term "maritime employment" within the context of the LHWCA.

Workers' compensation laws, of which the LHWCA is one, are in the public interest, and as such they are to be construed liberally so as not to defeat an *obvious legislative purpose* or lessen the scope *plainly intended* to be given, and, if possible, so as to avoid incongruous and harsh results. In construing the statute, words may be read to include all meanings given to them by the courts and meanings within the word as *ordinarily* used, *Jamison v. Encarnacion*, 281 U.S. 635, 640 (1930), *Baltimore & P.S.B. Co. v. Norton*, 284 U.S. 408, 414 (1933), *Voris v. Eikel*, 346 U.S. 328, 333 (1953) and *Northeast*, *supra*, 432 U.S. at 268. But while workers' compensation laws are to be construed liberally, there are constraints.

The issue here is to whom did Congress in 1972 obviously and plainly intend to extend the benefits of the LHWCA, and to whom did it not so intend. There is no doubt that Congress specifically intended to exclude some employees of maritime employers from the LHWCA benefits, and, therefore, the intentions of Congress as expressed in the legislative history of the 1972 amendments must be carefully examined.

² The other cases are *Director, Office of Workers' Compensation Programs, et al. v. Rasmussen et al.*, Nos. 1465, 1481 (amount of death benefits), and *Edmonds v. Compagnie Generale Transatlantique*, No. 78-479 (apportionment of third party damages).

The applicable portions of the legislative history of the 1972 amendments indicate that Congress' obvious legislative purpose was to extend LHWCA coverage only to employees part of whose daily activity was then indisputably longshoring, and that it plainly intended not to extend LHWCA coverage to employees, none of whose activities were covered by the Act before 1972, nor to *individuals* whose employers are not engaged in work upon the navigable waters.

Had Congress intended to extend LHWCA coverage to all shoreside workers in a maritime terminal adjoining the navigable waters it could have so provided. But Congress did not so provide. In fact, it expressly disclaimed an intention to extend coverage to *all* workers and all "employees" on the terminal facility. Congress' only intent was to cure the problem of fortuitous changes in coverage in response to suggestions of the Court in *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969) and *Victory Carriers v. Law*, 404 U.S. 202 (1971).

The Express Purpose or Intent of Congress

The announced purposes or stated intents of the Congress to extend LHWCA coverage shoreward are contained in the Committee Reports of the House of Representatives Committee on Education and Labor No. 92-144, 92d Congress 2d Session, and the Senate Committee on Labor and Public Welfare, No. 92-1125, 92d Congress 2d Session.³ The two reports are substantially identical⁴ and

³ 3 U.S. Code Cong. & Admin. News 4698 *et seq.*, 92nd Congress, 2nd Session.

⁴ The Senate Report at page 2 contains the following sentence which the House Report does not: "The bill also expands coverage of this Act to cover injuries occurring in the contiguous dock area related to longshore and ship repair work." Otherwise, the statute and the reports only use the adjective "adjoining". The words are synonymous, but different. "ADJACENT, ADJOINING, CONTIGUOUS, ABUTTING mean being in close proximity. ADJACENT

each contains a page and a half of explanation entitled "Extension of Coverage to Shoreside Areas" (H. Rept. pgs. 10-11; S. Rept. 12-13). There was no testimony presented to either Committee concerning the extension of LHWCA coverage shoreward, and the legislative history is essentially limited to the two Committee reports.

As to their *specific intentions* the Committees stated:

- (1) "The intent of the Committee is to permit a uniform compensation system to apply to *employees who would otherwise be covered by this Act for part of their activity.*" (H. Rept. p. 10, S. Rept. p. 13) (Emphasis supplied).
- (2) "The Committee does not intend to cover *employees* who are not engaged in loading, unloading, repairing or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity." (H. Rept. p. 10, S. Rept. p. 13) (Emphasis supplied).
- (3) "Likewise the Committee has no intention of extending coverage under the Act to *individuals* who are not employed by a person who is an employer i.e., a person at least some of whose *employees* are engaged, in whole or in part in some form of maritime employment." (H. Rept. p. 10, S. Rept. p. 13) (Emphasis supplied).

Immediately preceding the statement as to its affirmative intention each Committee report stated:

"It is apparent that if the Federal benefit structure embodied in the Committee bill is enacted, there

may or may not imply contact but always implies absence of anything of the same kind in between; *ADJOINING* definitely implies meeting and joining at some point or line; *CONTINUOUS* implies having contact on all or most of one side; *ABUTTING* suggests having a contact with something else at a boundary or dividing line." Webster's Seventh New Collegiate Dictionary, pg. 11 (Emphasis supplied), G&C Merriam Company, 1970.

would be a substantial disparity in benefits payable to a permanently disabled *longshoreman*, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo handling techniques, such as containerization and the use of LASH-type vessels, more of the *longshoreman's work* is performed on land than heretofore." (H. Rept. p. 10, S. Rept. p. 13) (Emphasis supplied).

From the above it is clear that the "obvious legislative purpose" or the "scope plainly intended" to be given to shoreward extension of coverage in section 2 of the Act was to extend coverage to longshoremen whose work has moved from the vessel onto the dock because of containerization or other modern cargo-handling techniques, and who without the amendment would be covered by the LHWCA for only part of their daily longshore activities. In short, the so-called "amphibious" worker whose activities would cause him to walk into and out of LHWCA coverage on any one day.

It is equally clear that the activities in which Bryant and Ford were engaged on land were not the result of the advent of modern cargo-handling techniques;⁵ that they were not "longshoremen"; and that none of their activities would have been covered by the LHWCA before its amendments in 1972. Congress intended to draw no geographically fixed line of demarcation between federal and state laws, but it did attempt to draw a very definite functional or work activity line, requiring two findings (1) "situs" of the injury and (2) "status" of the employee, *Northeast, supra*, 432 U.S. at 265.

As to other employees of the covered employer Congress clearly stated that if they were not engaged in loading,

⁵ *Northeast, supra*, 432 U.S. at 272.

unloading, repairing or building a vessel they were not to be covered by the LHWCA even if they were injured on areas adjoining the navigable waters customarily used for such activities by covered fellow employees. Congress clearly stated that it did not intend to extend LHWCA benefits to non-longshoremen like Bryant and Ford even if they were injured in an area adjoining the navigable waters since they were not loading or unloading vessels. Thus, Congress contemplated that some employees of a maritime employer would be covered by the LHWCA and that some would not.

Congress also specifically excluded from LHWCA coverage employees of non-maritime employers who, in the course of their own employer's business might be injured in an area adjoining the navigable waters. In the sentence that states Congress' second negative intention the Committees carefully used the term *individual* to describe such workers rather than *employee* used in the first statement of negative intention to plainly indicate that there were two, specific, exclusions to LHWCA coverage. Because the Commission intentionally used *individual* in one negative intention statement as to workers who are not covered by the Act, it is clear that the term *employee* used in explanation of its first stated negative intention refers only to *employees* of a covered employer. Then that sentence would have to be read as:

"Thus [Ford and Bryant,] employees [of P.C. Pfeiffer Company and Ayres Shipping Company] whose responsibility is only to pick up stored cargo for further transhipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo." (H. Rept. pg. 11, S. Rept. pg. 13).

Since the only responsibility of Bryant and Ford was to pick up, put down, or secure cargo for further tranship-

ment Congress expressly intended *not* to extend LHWCA benefits to either of them.

The denial of LHWCA benefits to workers like Ford and Bryant will produce no "harsh and incongruous" result as they will continue, as before 1972, to be entitled to the benefits of state workers' compensation laws for all of their activities. They would be entitled to the same state compensation benefits which are available to maritime workers whose maritime employer is an agency of the United States, or any State or foreign government, or any political subdivision thereof. (33 USC § 903(a) (2), *Bagrowski v. American Export Lines, et al.*, 305 F. Supp. 432 (DC, ED Wis 1969), reversed on other grounds, 440 F.2d 502 (7th Cir. 1970)).

Had Ford and Bryant been engaged in the activities in which they were injured in nearby Galveston, for example, or in any other port at which terminal operations were conducted by public port authorities or municipal and state agencies they would not, either before or after 1972, be entitled to LHWCA benefits.⁶ Thus, the continued denial of LHWCA benefits to Ford and Bryant by Congress in the 1972 amendments works a no more harsh and incongruous result than does Congress' continued withholding of LHWCA benefits to all employees, both maritime and non-maritime, of employers specified in section 3(a)(2).

Shoreside Extension of Coverage

The Federal Respondent states that the unresolved issue after *Northeast, supra*, is whether "maritime employment," for the purposes of the Act, includes all physical

⁶ There are many such operations along the Atlantic and Gulf coasts of the United States. See, "The Stevedore and Marine Terminal Industry of the United States" referred to *Northeast, supra* at footnote 38, 432 U.S. at 276. That survey is also reproduced in the Reply Brief of Petitioner P. C. Pfeiffer Company in the record in the Court below.

cargo handling in the waterfront area, and particularly tasks necessary to transfer cargo between land and water transportation (Memorandum for the Federal Respondent, pgs. 3-4) or in more precise terms, is trans-shipment on land covered by the Act.⁷ Congress has already answered the Federal Respondent's question with an unequivocal "No!" Shoreside cargo handling by *individuals* whose employer has no employees working, in whole or in part, upon navigable waters are not covered by the Act, (H. Rept. p. 10, S. Rept. 13). Secondly, "employees" of covered "employers" whose only function is to engage in

⁷ Actually the Federal Respondent would go even further. In LHWCA Program Memorandum No. 58 of August 10, 1977 issued immediately after the decision in *Northeast, supra* the Federal Respondent announced "Guidelines for Determination of Coverage of Claims under Amended Longshoremen's Act" pg. 9, i.e. "The test is essentially quite simple: was the injured worker employed in the waterfront cargo-handling industry in work directly related to the cargo or to the equipment or premises used to handle it? If so, the worker had "employee" status under 2(3)". Apparently the Federal Respondent will eventually eliminate navigable waters, maritime employment, vessels, and longshoring operations from the statute unless this Court decisively determines the extent of shoreside coverage. The Federal Respondent attempted to extend coverage to purely clerical workers, but was rebuffed by the Third Circuit in *Maher Terminals, Inc. v. Farrell*, 548 F.2d 476 (3rd Cir. 1977). The Benefits Review Board has adopted the Federal Respondent's most expansive views, however, and has extended LHWCA coverage to equipment repairmen on "situs", *Sargent v. Matson Terminals Inc.*, 8 BRBS 564 (1978); *Lewis v. Pittston Stevedoring Corp.*, 8 BRBS 321 (1978) and *Carroll v. Hullinghorst Industries*, 7 BRBS 538 (1978), and even to such workers not even on the "situs", *Texports Stevedore Co. v. Winchester*, 6 BRBS 265, 554 F.2d 245 reh. den. 561 F.2d 1213 (5th Cir. 1977) reh. granted 569 F.2d 428 (5th Cir. 1978). In its "Guidelines" at pg. 11 the Federal Respondent states as to "situs" that "buildings in which stevedoring equipment is maintained and stored may be located outside the fenced boundaries of a terminal, and that "although they do not themselves adjoin the water, they are parts of terminal complexes which do, and are within the Act." Thus an employee who never works on a vessel nor goes onto an area adjoining navigable waters would be entitled to LHWCA benefits if painting a fork-lift truck which may be used by an employee who is covered by the Act.

cargo trans-shipment, are not covered by the Act (H. Rept. p. 10, S Rept. p. 13). Thirdly, *only* to "employees" of covered employers who are engaged in the immediate transport of cargo between the vessel and a storage or holding area on the pier, wharf, or terminal adjoining navigable waters, or employees part of whose other activities would otherwise be covered by the Act did Congress *expressly extend* LHWCA benefits (H. Rept. p. 10-11, S. Rept. p. 13). The Committees did not discuss car or truck loaders/unloaders, warehousemen, "cotton headers", equipment repairmen and the like because in 1972 *none* of those workers walked into or out of LHWCA coverage. There was no problem in ascertaining which workers' compensation law pertained to their employments. All of their activities, every day, were subject to State law. As to them, the compensation system was already uniform, and the Committees were not concerned about such workers.

It is conceded that neither Ford nor Bryant is, nor was, a longshoreman. It is also conceded that this Court's decision in *Northeast, supra*, does not fully answer the issue presented here. As in *Northeast*, this Court is asked to determine what the Congressionally undefined terms "maritime employment" and "longshoring operations" mean, and what did Congress mean when it used those terms. The NAS believes that the task of the Court is not as "difficult" as it was in *Northeast, supra*, 432 U.S. at 265, unless it attempts to square with the statute the Federal Respondent's use of other terms not mentioned by the Congress, such as "waterfront area", "physical cargo handling", "equipment or premises used to handle cargo". In that event, the difficult task becomes impossible.

The test of coverage, as to the "status" of the injured worker, announced by the Fifth Circuit in these cases prior to this Court's decision in *Northeast, supra*, actually

does not conflict with the decision of the Fourth Circuit in *Conti v. Norfolk & Western Ry. Co.*, 566 F.2d 890 (4th Cir. 1977). The Fifth Circuit stated that "The test, rather, was to be whether they were directly involved in the loading or unloading functions," 539 F.2d at 541, footnote 21.⁸

The Fourth Circuit in *Conti, supra*, at 566 F.2d at 895 interpreting this Court's decision as to "status" in *Northeast, supra*, stated:

"To us the nub of the Court's decision is that an employee who is not engaged in "an integral part of the unloading process" will not fall within the coverage of the Act unless his occupation is of a traditional maritime nature.

In *Northeast, supra*, 432 U.S. at 273 this Court stated:

"It seems clear, therefore, that when Congress said it wanted to cover 'longshoremen', it had in mind persons whose employment is such that they spend at least some of their time in *indisputably longshoring* operations and who, without the amendments would be covered for only part of their activity." (Emphasis supplied.)

It is clear beyond doubt that before the 1972 amendments neither Ford nor Bryant would have been covered for any part of their activities as rail and truck loaders and unloaders, *Nacirema Operating Company, supra*, and *Victory Carriers, supra*. It is equally clear that rail-

⁸ Actually in the course of its lengthy opinion the Court in one sentence stated what it meant to accomplish:

"Our holding is that an injured worker is a covered 'employee' if at the time of the injury (a) he was performing the work of loading, unloading, building or repairing a vessel, or (b) although he was not actually carrying out these specified functions, he was 'directly involved' in such work". 539 F.2d at 539, 540.

car and truck loading/unloading are not indisputably longshoring operations, *Pennsylvania Railroad Co. v. O'Rourke*, 344 U.S. 334 (1953), *Noguiera v. New York, N.H. and H.R. Co.*, 281 U.S. 128 (1930). *Northeast, supra*, 432 U.S. at 264 unless performed on navigable waters.

Although Congress has not defined or plainly described all the key terms, particularly "maritime employment" and "longshoring operations," some key terms have been agreed upon as to their meaning, such as "stevedore", "stevedore contract", "terminal operator", "longshore gang",⁹ "LASH",¹⁰ "container stuffing and stripping"¹¹ and "point of rest".¹² In addition, six years after the 1972 amendments became law and over a year after this Court's decision in *Northeast*, the Secretary of Labor still defines the term "longshoring operations" as:

"The loading, unloading, moving or handling of cargo, ship's stores, gear, etc. into, in or out of any vessel on the navigable waters of the United States" (20 CFR 1918.3(1)).

Obviously Ford's and Bryant's activities are not included in that definition.

All Lines Move

In some manner this Court must decide where Congress intended to move the line separating LHWCA from state workers' compensation laws, or the Court will continue to be flooded with endless litigation. The NAS submits that the endless litigation will not end if the jurisdictional line for non-amphibians is drawn anywhere other than the "point of rest" which always has and still does clearly define the functional delineation between "longshoring"

⁹ *Northeast, supra*, footnote 4, 342 U.S. at 254.

¹⁰ Id. at 273, 274.

¹¹ Id. at 252, 270, 271.

¹² 46 CFR 533.6(c).

and non-longshoring operations, and that drawing the jurisdictional line of demarcation there does not restrict extension of coverage any more than the Congress intended in 1972. The fact that the Congress did not specify it *in haec verba* does not mean that Congress did not intend its equivalent.

No line, other than perhaps the water's edge, is physically immovable, and that includes the fence, if there be one, around a marine terminal. Like the physical location of the functional point of rest a fence may be moved. It may be moved because the terminal operator desires it, or it can be moved because the terminal owner, the Coast Guard, the Customs Service or some other governmental agency wants it moved. Moreover, drawing a line at the terminal fence may not satisfy the Benefits Review Board or the Federal Respondent, both of whom would extend "situs" beyond the actual terminal to places adjacent thereto, or not adjacent thereto, and so on across the country.¹³ Congress clearly did not intend, directly

¹³ In the words of one noted commentator: "If two blocks—then why not two miles? Or twenty? Or two hundred? The only limit is said to be the facility's 'use as a maritime enterprise.' Presumably the maritime commerce could be alleged to continue for almost any distance, provided its maritime purpose continued, and did not change into landward delivery and distribution.

This is not to say that the two decisions just cited were wrong. On their facts they are probably right, in that a street or even two blocks hardly seems enough of a physical separation to justify subdividing an obviously integrated waterfront operation. *The purpose here is merely to utter an early warning against becoming embarked upon a progressive geographical expansion in which each widened concentric circle is compared with the last, until the original statutory boundary is irretrievably lost.*

As a matter of statutory construction, the most obvious criticism of the Board's generalization is that it leaves the word 'adjoining' with nothing to contribute. The full clause involved reads: 'other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel.' The Board's dictum accurately describes the effect of the phrase beginning 'customarily used.' The word 'use' is the key word in each case, the Board's phrase being

or indirectly that the terminal fence be the line of demarcation.

It is equally clear that Congress did not, knowingly or unknowingly, change the definition of "navigable waters". That term means the same today as it meant in 1972. By amending Section 3(a) Congress meant to extend LHWCA coverage beyond the navigable waters only to employees who may work on them or on specified areas adjacent to the navigable waters in specific employments, i.e., "longshoremen and harborworkers, etc.". Neither did Congress convert truck or railcar unloading/loading on dry land into activities on navigable waters, nor was the terminal made a "navigable water". The terminal remained an "area adjoining such navigable waters",¹⁴ and it obviously cannot be a "navigable water"

'use as a maritime enterprise.' If this is all there is to the rule, why was 'adjoining' hooked on at the beginning, not once but twice? *The answer, once more, is that Congress intended a dual coverage test—one part of which related to function, and one to geography. Congress could have extended coverage to the outer limits of maritime commerce enterprise, or contract, but did not. It drew a physical boundary, beginning with navigable waters as such, and then expanding to 'adjoining' areas, adding, in the case of 'other areas,' the requirement of customary use in named maritime activities.* The word 'adjoining' is a word descriptive of a physical relationship of proximity. It cannot realistically be structured to include some sort of relationship of purpose of function." "The Conflicts Problem Between the Longshoremen's Act and State Workmen's Compensation Acts Under the 1972 Amendments," Arthur Larson, *Houston Law Review*, Vol. 14, Number 2, January 1977 at page 296-7 (Vol. 14: 287) (Emphasis supplied). Professor Larson's feared journey inland has already begun. In *Davis v. American President Lines, Ltd.* 7 BRBS 622 (1978), an equipment repairman injured in a facility located approximately 1.5 miles from the employer's main harbor terminal in a building that did not physically abut the main terminal was awarded LHWCA benefits.

¹⁴ House Report pg. 10: "Accordingly the bill would amend the Act to provide coverage of longshoremen—and other employees engaged in maritime employment—if the injury occurred either upon the navigable waters of the United or any adjoining pier, wharf, dry dock, terminal building way, marine railway, or other

and "adjoining such navigable waters" at the same time. So it cannot be said that Ford, Bryant, equipment repairmen, etc., were engaged in activities on the navigable waters.

The Real Unresolved Issue

The real unresolved issue is what does "maritime employment" mean in the context of loading and unloading vessels and within the meaning of sections 2(3) and 2(4) of the Act as amended in 1972. As the Court pointed out in *Northwest, supra*, Congress never defined "maritime employment", but it did give some indication of what it meant those words to mean by the "typical example" of shoreward coverage provided in the Committee Reports.¹⁵ This Court did not define maritime employment either, but held in *Northeast, supra*, 432 U.S. at 273, that unloading of cargo which had been carried by a vessel onto a truck at a "situs" by an *amphibious longshoreman* was maritime employment, and the amphibian in that instance to be covered by the LHWCA.

Attempts to extend LHWCA coverage beyond that amphibian (Caputo) or to those engaged in work which is the equivalent of that formerly performed on the ship (Bundo's container stuffing and stripping) have caused so much chaos and confusion that the insurance industry is either unwilling or unable to provide LHWCA insurance coverage. All affected industries, including those who do not believe Congress even considered them in 1972, took their case to Congress in the 95th Congress.¹⁶ It is clear

area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing or building a vessel". (Emphasis supplied).

¹⁵ S. Rept. at 18; H.R. Rept. at 10-11.

¹⁶ Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act, Hearings before the Subcommittee on Compensation, Health and Safety of the Committee on Education and Labor, House of Representatives, Ninety-Fifth Congress, First

from those Oversight Hearings, particularly those held in the Second Session (1978), to be printed in January 1979, that Congress itself did not know how far geographically it intended to extend coverage shoreward, but that it intended to extend coverage only to a limited class of employees—those who before 1972 could walk into and out of coverage during their daily employment.

This Court in *Northeast, supra*, in footnote 34 at 432 U.S. 272 stated that it would be useful if the Benefits Review Board engaged in an "extensive study of the structure of work on the various piers of the country", and that such a study would be helpful for future cases. The Benefits Review Board did not undertake such a study. Prior to the decision in *Northeast, supra*, the Secretary of Labor had a study of Longshore and Harbor Workers' Compensation Program prepared by an OWCP Task Force.¹⁷ Although that report contains a "Glossary of Terms in Longshoreman's and Harbor Workers' Compensation Act (LHWCA)" at Appendix A pgs. 97-102, no definition was advanced for "maritime employment", "longshoreman", or "longshoring operations" Appendix B-1 of the report (pages 103-107) does contain a discussion entitled "Nature and Character of the Longshore Industry", which in general terms describes fairly accurately some of the activities which take place in the piers of the country. To our knowledge, the only current comprehensive study of the structure of work on the various piers of the country is the NAS study to which the Court referred in *Northeast, supra*.

Session, Part 1. Part 2 has not yet been printed. See also. Subcommittee Report at *Congressional Record* pgs. E5959-61 November 9, 1978.

¹⁷ U.S. Dept. of Labor, Office of Workers' Compensation Programs Task Force Report, Longshore and Harbor Workers' Compensation Program (1976).

The NAS submits that much of the chaos and confusion over the intent of Congress has arisen because of the Federal Respondent's unrelenting attempts to make words mean things different than actual practice has long recognized them to mean. The "essentially quite simple" test promulgated by the Federal Respondent in LHWCA Program Memorandum No. 58¹⁸ is a prime example of those attempts in that "status" is extended to employees engaged in *work directly related to the cargo or the equipment or premises used to handle it*. That test would include the janitor who cleaned up after a mechanic who was working on a piece of equipment, perhaps even a piece of rope, which might at some time be used by someone directly in the process of loading a vessel. That same piece of equipment, however, might not be so used. The chaos, confusion and endless litigation that will come from the "essentially simple test" is too

¹⁸ In a prepared statement before the House subcommittee on Compensation, Health and Safety on May 22, 1978 during its oversight hearings on the LHWCA, the Assistant Secretary of Labor for Employment Standards, to whom the Federal Respondent reports stated: "We have also carried out other recommendations of the OWCP Task Force, mentioned earlier. On August 10, 1977 we issued Program Memorandum No. 58. It was drafted as an internal document in response to a recommendation by the Task Force that OWCP issue general guidelines on issues of coverage to the district offices for the sake of consistency of administration of the Longshore Act program. Basically, Program Memorandum No. 58 represents a synthesis of all Longshore coverage decisions, including the decisions of the U.S. Supreme Court in *Northeast Marine Terminal Co. v. Caputo* (432 U.S. 249), and its progeny, as well as decisions of the U.S. Courts of Appeals and the Department's Benefits Review Board. The *Caputo* case is a milestone since it is the only Longshore jurisdiction case to be decided by the U.S. Supreme Court following the 1972 amendments. Let me emphasize that the Memorandum's purpose was not to extend jurisdiction but to serve as a field guide for uniform nationwide administration of the Act in light of the most recent judicial interpretations of our jurisdiction." Nothing in *Northeast, supra*, suggests the "essentially simple" test of Program Memorandum No. 58, see *supra* at page 12, footnote 7.

enormous to comprehend, and a Court case involving the question of whether a mechanic putting anti-freeze in the stevedore company president's car on a pier is engaged in "maritime employment" because the president's employment is "maritime" is not beyond the realm of possibility.

The uncertainty, caused in large measure by Congress' failure to define terms and the Federal Respondent's attempts to attribute to Congress intentions Congress clearly denied, has had, and continues to have, devastating effects on the employers who must litigate each new situation or pay extraordinarily high compensation benefits or insurance premiums, if insurance is available.¹⁹ If words are given their plain meaning, and vessel "loading and unloading" is not translated into painting a forklift truck, splicing a rope, loading a truck, or securing a piece of cargo on a rail car, the chaotic situation that confronts the Courts and the industry will be ameliorated, and there will be a uniform compensation system. Those workers engaged in indisputably longshoring operations would be entitled to LHWCA benefits. If those who are so engaged may also on the same day perform other tasks on the "situs" they would, like *Caputo*, be entitled to LHWCA benefits all day. All others, like Bryant and Ford, who are not so employed would be uniformly all day entitled to state workers' compensation law benefits. As to each class of worker (1) the longshoreman of a ship gang, on land or water; (2) the longshoreman amphibian who also works on vessels and land the same day, and (3) those who never do (1) or (2), each would have a uniform compensation system as intended by Congress. None would walk into or out of coverage on any one day. Each would know to which compensation

¹⁹ In Houston, for example, a major employer testified in 1977 that between 1972 and 1977 his LHWCA premiums increased more than 180%, and his premium cost per man hour from 81 cents to 2.28. House Hearings, *supra*, pgs. 306-7; Id. at 462-483.

system he is entitled if he is injured. Likewise, the employer, the insurance carrier, the Courts and, hopefully, the Federal Respondent would know. No harsh or incongruous result would attach to such an interpretation of section 2(3) and 2(4) of the Act. Recent history indicates that any other interpretation causes chaos, confusion and endless litigation. Clearly, if there is anything sure, Congress did not intend chaos and confusion.

**An Unexpected Result of the Uncertainty—
Loss of Job Opportunities**

The high cost of LHWCA compensation, either benefits or insurance premiums, caused in part by the obscurity of the jurisdictional line between federal and state compensation law, has had devastating effects on the commerce of the United States and longshore dock labor as well as the employers. Those costs have contributed to the diversion of the United States cargoes away from this country's ports to readily available and lower cost ports in neighboring Canada. That diversion has reduced the income of the U.S. cargo handling industry, and has contributed to the constant reduction in work available for U.S. longshoremen.

For example, the Canadian ports of Montreal, Quebec, St. John, New Brunswick, and Halifax, Nova Scotia are in direct competition with U.S. ports on the Great Lakes and the North Atlantic for the handling of U.S. origin and destination cargoes carried by ships. According to a recent report by the U.S. Department of Commerce²⁰ for the period of 1974-1976 some 1,644,461 tons of U.S. origin cargo valued at \$1,391,511,479 was exported from the United States via land transportation (truck and

²⁰ U.S. Exports Transhipped Via Canadian Ports, U.S. Department of Commerce, Maritime Administration, January 1978.

rail) and loaded onto vessels at Canadian ports. An other report of the U.S. Department of Commerce indicates that because of the diversion U.S. port industries lost some \$90,445,335 in direct and indirect revenue. That is only as to exports!²¹

Other data reported by the U.S. Department of Commerce in U.S. Merchant Marine Data Sheets, Maritime Administration, discloses that from June 1, 1975 to September 1, 1978 the number of longshoremen, clerks, checkers and allied crafts available to work each day dropped from 64,000 to 56,773²²—an annual reduction of 15,032,160 man-hours. Admittedly, there may be other contributing factors to the loss of U.S. cargoes to neighboring Canada and the substantial reduction in U.S. dock labor work, but the high cost of LHWCA which U.S. employers must pay is a significant factor. For example, the manual rate established by the New York State Rating Board for general stevedoring is now over \$68 per \$100 of payroll. In Halifax, Nova Scotia the equivalent rate established by the Province of Nova Scotia is \$2.25 per \$100 of payroll, and in St. John, New Brunswick \$3.50. The U.S. and Canadian wage scales are almost identical.²³ The over \$60 per \$100 of payroll cost advantage can only enhance the competitive position of Canadian port interests vis-a-vis their U.S. competitors.

The resultant compensation cost-lost work spiral becomes readily apparent. As LHWCA coverage is extended to more and more workers and the jurisdictional

²¹ *Economic Impacts of the U.S. Port Industry: An In-Put Out-Put Analysis of Water Borne Transportation*, U.S. Department of Commerce, Maritime Administration (1978).

²² On November 1, 1978, the Maritime Administration reported the estimated average employment as of October 1, 1978 for longshoremen, clerks and allied crafts to be 49,395 for all four seacoasts.

²³ *House LHWCA Oversight Hearings, supra*, at page 531.

line remains obscure, the cost of compensation rises in an unpredictable manner. The added costs must be passed on to the ultimate consumer—the U.S. shipping public. The cost disparity to the shipper between a U.S. and a Canadian routing increases, and the shipper elects to route more of his cargo via Canadian ports. U.S. port revenues and man-hours decline. History tells us that as man-hours decline, compensation claims and costs increase, and so the process repeats itself.

Alternatively, American industry may turn to other avenues of relief from the high costs of the LHWCA. Non-maritime employers could undertake the stuffing and stripping of containers at locations outside the "situs" of the LHWCA. Carmelo Blundo would be unemployed. Consignees of cargo or truckers might begin to perform their own truck loading/unloading. Ralph Caputo and Will Bryant would be unemployed. The railroads might again do their own lashing or securing of cargoes on rail cars. Diverson Ford would be unemployed. Publicly-owned marine terminals could accelerate the use of state or municipal employees to perform all terminal operations or, as has already happened, go into the business of loading and unloading vessels at publicly-owned marine terminal facilities.

A Line Must Be Definitively Stated

As this Court stated in *Northeast, supra*, in 1972, Congress moved the line separating LHWCA coverage and the coverage of state workers' compensation laws, but except for persons like Ralph Caputo and Carmelo Bundo the location of that line remains obscure. In the absence of Congressional definition of key terms and no clear definition of the jurisdictional line of demarcation the Federal Respondent has fashioned an all inclusive and unreasonable "essentially simple test" and the Benefits Review Board has extended "covered

situs" to areas not adjoining the navigable waters. In the words of Professor Larson:²⁴

"It would be difficult to imagine a situation presenting a more urgent need for an early Supreme Court resolution, with perhaps tens of thousands of workers inhabiting a shadow land in which the range of possible benefits may vary so much as three or four hundred percent."

The line must be drawn, however, in such a manner that it is in furtherance of an obvious legislative purpose and will not lessen the scope plainly intended by Congress. The difficulties to be encountered if something like the Federal Respondent's "essentially simple test" is adopted are accurately described by Messrs. Gilmore and Black,²⁵ i.e.,

"The almost infinite range of conditions of the waterfront has been detailed in thousands of cases. The line between direct, indirect, physical 'participation' and direct, indirect non-physical 'participation' will be not a wit easier to draw than the line between Jensen and 'maritime but local' in the years before 1972."

Those authors agree with Professor Larson and the NAS that:²⁶

"Not only has the LHWCA gone ashore but, or so the legislative history suggests, only some types of workers injured within the new territorial limits of LHWCA are meant to be covered. If that is so, we are threatened with a spate of LHWCA litigation which will be at least as depressing as the 1927-1942 'local but maritime' litigation which preceded the invention of the twilight zone."

²⁴ Op. cit. at pg. 322.

²⁵ *The Law of Admiralty*, Second Edition, Grant Gilmore, Charles L. Black, Jr., The Foundation Pres., Inc. 1975 at pg. 430.

²⁶ Op. cit. pg. 428.

The stevedoring industry, and indeed all other employers and the few remaining insurance carriers subject to the LHWCA, cannot wait another 45 years while the courts try "to ascertain the respective spheres of coverage of state and federal systems," *Northeast, supra*, 432 U.S. at 259. Testimony presented to the subcommittee on Compensation, Health, and Safety of the House of Representatives Committee on Education and Labor during the LHWCA oversight hearings in the 95th session of Congress²⁷ clearly indicates that the extent of uncertainty and unpredictability of the LHWCA have caused such economic devastation that the insurance industry is unable or unwilling to provide the necessary insurance, and when it does provide the insurance many employers cannot afford to pay for it.

The jurisdictional line must be drawn now. It must be clear and unmistakable, and we submit, compatible with existing practices and labor-management contracts.

In these cases the practices are not questioned, and the pertinent labor-management agreements clearly separate maritime from non-maritime employment. The NAS believes that "point of rest", even though rejected by this Court as to Blundo and Caputo in *Northeast, supra*, comes the closest to meeting what Congress intended and is the most understood line of demarcation between the state and federal spheres. The NAS recognizes that there may be a few Ralph Caputos whose daily employment requires them to cross over that line and that as to them, perhaps they should be eligible for LHWCA benefits if injured on such days. On the other hand, there are many, many more employees on the country's piers like Bryant and Ford who never cross the "point of rest" in their daily employments, and they should not be entitled to LHWCA benefits.

²⁷ Subcommittee activities Report reproduced as Appendix B to this brief.

The point to be made is that there is no twilight zone or questionable area of coverage if the line of demarcation is clearly drawn at some place like the "point of rest" where maritime and non-maritime employments meet, but do not overlap. For example, in the case of Diverson Ford, he was not engaged in the last step of maritime employment. He was actually engaged in the second step of inland transportation. *First* the vehicles had to be placed on the railroad cars. They were placed there solely for inland movement. They could have been driven out of the terminal under their own power. The *second* step, that in which Ford was engaged, was to secure the vehicles to the railroad cars so they wouldn't fall off or move in transit overland. Nothing Ford was doing was related to vessel loading/unloading either directly or indirectly.

Will Bryant, on the other hand, was engaged in the last step of carriage by motor carrier in inland transportation. He was taking cotton off a truck, completing the obligation of the motor carrier to deliver the cotton. His activities were directly related to motor carriage on land, and were not directly or indirectly related to vessel loading/unloading.

Defining the line of demarcation as urged by the NAS would terminate a substantial amount, if not all, of the litigation over what Congress intended in 1972 in a manner consistent with Congress' express intentions, both negative and positive, and with existing industry practices and labor-management agreements. Additionally, it would remove a major cause of the uncertainty which has so adversely affected the insurance industry, the employers and employees subject to the Act.

Conclusion

The tests for coverage stated by the Fourth and Fifth Circuits are essentially correct, but the Fifth Circuit, it is submitted, misapplied its own test as to Bryant and Ford. Neither Bryant nor Ford was (a) performing the work of loading, unloading, building or repairing a vessel nor (b) directly involved in such work. Ford was directly involved in activities directly related *only* to inland rail transportation, and Bryant was directly engaged in activities solely related to motor carriage. Denying them LHWCA benefits will work no harsh and incongruous result. On the contrary, denial of LHWCA benefits to them would resolve a substantial problem which has caused chaos, confusion, and much litigation, and would permit the uniform compensation system so ardently sought by the Congress. For all of these reasons, the decision of the Fifth Circuit should be reversed.

Respectfully submitted,

THOMAS D. WILCOX

THOMAS D. WILCOX, P.C.
919 Eighteenth Street, N.W.
Washington, D.C. 20006

Attorney for
National Association of Stevedores,
Amicus Curiae

Appendices

APPENDICES

November 9, 1978

CONGRESSIONAL RECORD

Extensions of Remarks

E5959

E5961

ACTIVITIES OF THE SUBCOMMITTEE ON COMPENSATION, HEALTH AND SAFETY FOR THE 95TH CONGRESS

HON. JOSEPH M. GAYDOS

OF PENNSYLVANIA

IN THE HOUSE OF REPRESENTATIVES

Saturday, October 14, 1978

• Mr. GAYDOS. Mr. Speaker, the subcommittee on Compensation, Health and Safety, on which I am pleased to serve as chairman, conducted extensive legislative and oversight hearings during the 95th Congress on the various matters subject to its jurisdiction.

The subcommittee jurisdiction encompasses the following public laws:

Occupational Safety and Health Act of 1970 (Public Law 91-596);

Federal Mine Safety and Health Act of 1977 (Public Law 95-164);

Federal Employees' Compensation Act (Public Law 93-416); and

Longshoremen's and Harbor Workers' Compensation Act (Public Law 92-576).

The subcommittee, during 1977 and 1978, held 43 days of oversight hearings on the following laws within its jurisdiction:

First. Occupational Safety and Health Act of 1970—14 days;

Second. Longshoremen's and Harbor Workers' Compensation Act—17 days; and

Third. Federal Employees' Compensation Act—12 days.

Additionally, the subcommittee held 13 days of legislative hearings on the following bills within the subcommittee's jurisdiction:

First. H.R. 4287, Federal Mine Safety and Health Amendments Act of 1977—6 days;

Second. H.R. 4286, Youth Camp Safety Act—5 days; and

Third. H.R. 13461, Asbestos Related Disease Screening Act of 1978—2 days.

LEGISLATIVE ACTIVITIES ²⁸

C. The Longshoremen's and Harbor Workers' Compensation Act

The subcommittee conducted field hearings at San Francisco, Calif., on June 24-25, 1977, and 15 additional hearings at Washington, D.C.

²⁸ Part A pertaining to Mine Safety and Health and Part B pertaining to the Federal Employees Compensation Act omitted as not relevant.

Witnesses testifying before the subcommittee included Members of Congress, and representatives of the recreational boating industry, stevedore organizations, ship-builders, the insurance industry, State insurance departments, labor organizations, the offshore drilling contractors, the Offshore Marine Services Association, the Associated General Contractors, the Office of Workers' Compensation Programs of the Department of Labor.

The Longshoremen's and Harbor Workers' Compensation Act was last amended in 1972. In addition to upgrading certain of the benefit provisions of the act, the jurisdiction of the act was extended from "navigable waters" to "adjoining areas."

Industry witnesses submitted the following criticisms:

First. Jurisdiction: It is alleged that the extension to "adjoining" areas leaves vague and unclear just what operations on land are covered. The small recreational boatyards, in particular, are in a state of uncertainty as to the status of their employees working at locations which are not geographically adjacent to navigable waters. The small boat and barge builders expressed concern about their employees who may be involved in nonmaritime construction during extensive periods of the year.

Second. Unrelated death benefits: The law provides that if a claimant receives compensation benefits for either permanent partial or permanent total disability and dies from any cause, his widow and/or survivors would be entitled to certain benefits. It is contended this has the effect of adding a life insurance policy to a workers' compensation law.

Third. Annual escalation of benefits: It has been contended that the unpredictability of future, annual escalation of benefits makes insurance premium assessment equally unpredictable, resulting in higher insurance costs.

Fourth. No limitation on weekly benefits to widows and/or survivors in case of death: Since there is a maximum payable for total permanent disability, it is alleged that, in certain instances, a widow could receive higher benefits from the death of the employee than if he was receiving total permanent disability benefits.

Fifth. Procedure for establishing loss of wage-earning capacity: It has been stated that in some cases a claimant receives compensation in excess of his take-home wages prior to injury.

Sixth. Employers' access to an independent physical examination: It has been alleged that in certain district offices, the deputy commissioners are unwilling to order an independent medical examination at the request of an employer.

Seventh. Settlements: It has been alleged that the administrative law judges have no authority to approve settlements, which results in excessive litigation.

Assistant Secretary Elisburg testified as to the administrative problems in implementing the act, but stated he intends to substantially upgrade the administration of the act. Additionally, he informed the subcommittee that the Labor Department has authorized a study to conduct an indepth study of insurance rates and availability under the act.

I would like to take this opportunity to thank Members of Congress and others who have appeared as witnesses before the Subcommittee on Compensation, Health and Safety, and I would particularly like to thank members of the subcommittee who have been so cooperative throughout the 95th Congress. *

CM
MOTION FILED
JAN 11 1979

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-425

P.C. PFEIFFER COMPANY, INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

v.

DIVERSON FORD AND DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents,

and

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

v.

WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE
ALLIANCE OF AMERICAN INSURERS, THE NATIONAL
ASSOCIATION OF INDEPENDENT INSURERS, AND
THE AMERICAN INSURANCE ASSOCIATION,
AS AMICI CURIAE

DAVID R. OWEN,
FRANCIS J. GORMAN,
10 Light Street,
Baltimore, Maryland 21202,
*Attorneys for Amici
Curiae.*

Of Counsel:

SEMMES, BOWEN & SEMMES,
Baltimore, Maryland

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-425

P.C. PFEIFFER COMPANY, INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

v.

DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,

Respondents,

and

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

v.

WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF THE
ALLIANCE OF AMERICAN INSURERS,
THE NATIONAL ASSOCIATION OF INDEPENDENT
INSURERS, AND THE AMERICAN INSURANCE
ASSOCIATION, AS AMICI CURIAE.

The Alliance of American Insurers, the National Association of Independent Insurers, and the American Insurance Association (hereinafter collectively referred to as "Amici") move pursuant to Rule 42(3) of the Supreme Court Rules for leave to file the attached Brief as *amici curiae* in support of the Petitioners. Counsel for the Petitioners and Counsel for the Federal Respondent have consented to the filing of this Brief. Counsel for Respondents have not consented.

The Alliance of American Insurers is an organization of 119 property-casualty insurance carriers. Its members write approximately 25% of the workers' compensation insurance premiums in the United States, and in 1975 its members wrote approximately 1.5 billion dollars in workers' compensation premiums. With respect to Longshoremen's Act premiums, its members wrote approximately 30 million dollars out of a total for 1976 of nearly 75 million dollars.¹ The National Association of Independent Insurers is a voluntary trade association of over 400 insurance companies. Its members write approximately 10% of the workers' compensation premiums in the United States. The American Insurance Association is an association of 145 property-casualty insurance carriers. Its members write approximately 45% of the workers' compensation insurance in the United States.

Section 32 of the Longshoremen's and Harbor Workers' Compensation Act (hereinafter "Longshoremen's Act"), 33 U.S.C. §932, requires each covered employer to secure the payment of compensation by either (1) obtaining compensation insurance from an authorized carrier, or (2) furnishing satisfactory proof of its financial ability to pay such compensation as a self-insurer. To satisfy their obligations under the Longshoremen's Act, and the several statutes in which it has been incorporated, many employers have obtained

¹ These 1975 and 1976 statistics are the latest available, and Amici believe them to be representative of the situation as it exists now.

workers' compensation policies from members of Amici. For these reasons, Amici have been vitally concerned with the operation of the Longshoremen's Act generally and have a great interest in the issues before the Court in this particular case.

The question before the Court is whether the 1972 Amendments extended the jurisdiction of the Longshoremen's Act inland to categories of non-amphibious, warehouse or terminal workers who satisfy none of the post-amendment criteria for such jurisdiction discussed in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). The Federal Respondent has taken the position that maritime employment includes all physical cargo handling in the waterfront area and all tasks necessary to transfer cargo between land and water transportation. Federal Respondent's Memorandum On The Petition For A Writ Of Certiorari at 3-4. The Benefits Review Board of the Department of Labor has advanced the same position in its decisions on coverage questions. Moreover, the Federal Respondent and the Benefits Review Board have sought to expand the coverage of the Longshoremen's Act to employers not engaged in traditional maritime activity and to activities having no direct relation to a vessel's navigation and commerce.

The expansive position of the Federal Respondent, in this case and in general, with respect to the jurisdiction of the Longshoremen's Act has had and is continuing to have a significant and detrimental impact on members of Amici. The availability and cost of insurance for Longshoremen's Act compensation have been gravely affected by the expansive approach taken to Longshoremen's Act jurisdiction by the Federal Respondent and the Benefits Review Board. The continued unrestricted expansion of the coverage provisions of the 1972 Amendments would have a significant impact upon the members of Amici and their existing and future workers' compensation contracts.

Amici do not believe that the parties have considered the issue before this Court, and its potential ramifications, in the same manner as treated by Amici in their Brief. Amici therefore request that this Court grant leave to file the attached Brief.

Respectfully submitted,

DAVID R. OWEN,
FRANCIS J. GORMAN,
10 Light Street,
Baltimore, Maryland 21202,
*Attorneys for Amici
Curiae.*

Of Counsel:

SEMMES, BOWEN & SEMMES,
Baltimore, Maryland
January 11, 1979

TABLE OF CONTENTS

	<u>PAGE</u>
STATEMENT OF INTEREST OF AMICI CURIAE	2
QUESTION PRESENTED	2
SUMMARY OF ARGUMENT	2
ARGUMENT:	
I. The Unrestricted Expansion Of The Coverage Provisions Of The 1972 Amendments Has Created Such Unpredictability That The Market For Longshoreman's Act Insurance Is Drying Up And Becoming Prohibitively Expensive	3
II. The Escalating and Uncapped Benefits Payable under The 1972 Amendments Have Caused The Compensation Exposure Of Many Employers And Industries To Be Uninsurable	10
III. This Court Should Adopt A Clear Definition Of Maritime Employment And Tests For Coverage Under The Longshoremen's Act Which Require That The Work Have A Direct Relation To A Vessel's Navigation And Commerce Or Have A Significant Relationship To Traditional Maritime Activity	16
CONCLUSION	25

TABLE OF CITATIONS

Cases

<i>Atlantic Transport Co. v. Imbrokev</i> , 234 U.S. 52 (1914)	19
<i>Bakke v. Duncanson-Harrelson Co.</i> , 8 BRBS 36 (1978)	7
<i>Bosarge v. Mississippi Coast Marine, Inc.</i> , 8 BRBS 224 (1978)	7
<i>Brady-Hamilton Stevedore Co. v. Herron</i> , 568 F.2d 137, (9th Cir. 1978)	6

	<u>PAGE</u>
<i>Cargill, Inc. v. Powell</i> , 573 F.2d 561 (9th Cir. 1977) .	5,21
<i>Carroll v. Hullinghorst Industries</i> , 7 BRBS 538 (1978)	8
<i>Conti v. Norfolk & Western Railway</i> , 566 F.2d 890 (4th Cir. 1977)	6,16,20
<i>Cross v. Lavino Shipping Co.</i> , 6 BRBS 579 (1977)	8
<i>Dravo Corp. v. Banks</i> , 567 F.2d 593 (3d Cir. 1977) ...	5
<i>Executive Jet Aviation, Inc. v. City of Cleveland</i> , 409 U.S. 249 (1972)	16,22-23, 24
<i>Frisco v. Perini Corp.</i> , 8 BRBS 694 (1978)	7
<i>Fuduli v. Maresca Boat Yard, Inc.</i> , 7 BRBS 982 (1978)	8
<i>Handcor, Inc. v. Director</i> , 568 F.2d 143 (9th Cir. 1978)	5
<i>Jacksonville Shipyards, Inc. v. Perdue</i> , 539 F.2d 533 (5th Cir. 1976)	20,24
<i>Jacksonville Shipyards, Inc. v. Perdue</i> , 575 F.2d 79 (5th Cir. 1978) (on remand)	3
<i>Jameson v. Marine Terminal Corp.</i> , 6 BRBS 424 (1977)	7
<i>Lewis v. Pittston Stevedoring Corp.</i> , 7 BRBS 691 (1978)	7
<i>Long Island Railroad v. Lowe</i> , 145 F.2d 516 (2d Cir. 1944)	21
<i>Massman Construction Co. v. Bassett</i> , 30 F.Supp. 813 (E.D.Mo. 1940), rev'd on other grounds, 120 F.2d 230 (8th Cir.), cert. denied 314 U.S. 648 (1941)	20
<i>McNeil v. Prolerized New England Co.</i> , 8 BRBS 1 (1978)	7
<i>Northeast Marine Terminal Co. v. Caputo</i> , 432 U.S. 249 (1977)	2
<i>O'Leary v. Coastal Navigation Co.</i> , 193 F.2d 717 (9th Cir. 1951)	21
<i>Parker v. Motor Boat Sales, Inc.</i> , 314 U.S. 244 (1941)	20
<i>Pennsylvania Railroad v. O'Rourke</i> , 344 U.S. 334 (1953)	20,22

	<u>PAGE</u>
<i>Pittston Stevedoring Corp. v. Dellaurentura</i> , 544 F.2d 35 (2d Cir.), cert. granted 97 S.Ct. 522 (1976)	24-25
<i>Reese v. Weyerhaeuser Co.</i> , 8 BRBS 379 (1978)	7
<i>South Chicago Coal & Dock Co. v. Bassett</i> , 309 U.S. 251 (1940)	21
<i>Stecz v. Sealand Service, Inc.</i> , 6 BRBS 291 (1977)	7
<i>Stewart v. Brown & Root, Inc.</i> , 7 BRBS 356 (1978) ...	8
<i>Stockman v. John T. Clark & Son</i> , 539 F.2d 264 (1st Cir. 1976)	24
<i>Territo v. Poche</i> , 339 So.2d 1212 (S.Ct. La. 1976) appeal dismissed, 98 S.Ct. 31 (1977) (No. 76-1258)	9
<i>Texports Stevedoring Co. v. Winchester</i> , 554 F.2d 245 (5th Cir. 1977), rehearing denied, 569 F.2d 428 (1978)	6
<i>Thibodaux v. Atlantic Richfield Co.</i> , 580 F.2d 841 (5th Cir. 1978)	8
<i>Weyerhaeuser Co. v. Gilmore</i> , 528 F.2d 957 (9th Cir. 1975) cert. denied, 429 U.S. 868 (1976)	16,23-24
STATUTES	
33 U.S.C. §902(3)	4,8,9
33 U.S.C. §908(d)	12
33 U.S.C. §909	12
33 U.S.C. §920(a)	24
REGULATIONS AND ADMINISTRATIVE NOTICES	
29 C.F.R. §1910.16(b)(1)	4
29 C.F.R. §1918.3(i)	4-5
LHWCA Program Memorandum No. 58 (8/10/77)	9,10

PAGE**LAW REVIEW ARTICLES**

<i>Longshoremen, Longshoring Operations, and Maritime Employment: A Dual Test of Status After Northeast Marine Terminal Co. v. Caputo</i> , 64 Va. L. Rev. 99 (1978)	6,17,18
--	---------

MISCELLANEOUS

H. Rep. No. 91-1441, 92d Cong., 2d Sess. (1972)	7,19
Oversight Hearings of Subcommittee on Compensation, Health and Safety of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977)	12,18
S. Rep. No. 92-1125, 92d Cong., 2d Sess. (1972)	7,19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-425

P.C. PFEIFFER COMPANY, INC. and
 TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,
 v.
 DIVERSON FORD and DIRECTOR, OFFICE OF
 WORKERS' COMPENSATION PROGRAMS,
Respondents,

and

AYERS STEAMSHIP COMPANY and
 TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,
 v.
 WILL BRYANT and DIRECTOR, OFFICE OF
 WORKERS' COMPENSATION PROGRAMS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE ALLIANCE OF AMERICAN
 INSURERS, THE NATIONAL ASSOCIATION OF
 INDEPENDENT INSURERS, AND
 THE AMERICAN INSURANCE ASSOCIATION, AS
AMICI CURIAE

STATEMENT OF INTEREST OF AMICI CURIAE

The interests of Amici are set forth in the Motion which precedes this Brief.

QUESTION PRESENTED

Did the 1972 Amendments expand the jurisdiction and coverage of the Longshoremen's Act to those not engaged in traditional maritime activity and to activities having no direct relation to a vessel's navigation and commerce?

SUMMARY OF ARGUMENT

The decision below should be reversed because it expands coverage under the Longshoremen's Act beyond the Congressional intent in enacting the 1972 Amendments. Ford and Bryant are not covered under either of the lines of analysis used by this Court in the *Caputo* decision. The Federal Respondent and the Benefits Review Board have in effect attempted to eliminate the maritime employment status requirement for coverage by advocating the expansion of coverage to any employee who happens to work on or near the waterfront. It is vitally important that this Court signal a halt to the unrestricted expansion of coverage under the 1972 Amendments to the Longshoremen's Act.

The unpredictability and uncertainty caused by the unrestricted expansion of coverage is compounded by uncapped benefit escalation and other open-ended benefit features of the 1972 Amendments. Many employers and industries are finding that their exposure under the Longshoremen's Act is uninsurable because primary and excess insurers are reluctant to underwrite a risk which appears so indefinite in both the scope of coverage and the level of benefit payments.

In the decision of the instant cases, this Court should articulate a clear and definitive test for maritime employment which requires that the work have a direct relation to a vessel's navigation and commerce or have a realistically significant relationship to traditional maritime activity. Amici also urge this Court to adopt the day of the injury as the time frame of the employment activity which is examined for purposes of determining coverage.

ARGUMENT

I.

THE UNRESTRICTED EXPANSION OF THE COVERAGE PROVISIONS OF THE 1972 AMENDMENTS HAS CREATED SUCH UNPREDICTABILITY THAT THE MARKET FOR LONGSHOREMEN'S ACT INSURANCE IS DRYING UP AND BECOMING PROHIBITIVELY EXPENSIVE.

On remand the Fifth Circuit stated that its prior holding that Ford and Bryant were covered under the 1972 Amendments was consistent with the rationale expressed by this Court in *Caputo*. *Jacksonville Shipyards, Inc. v. Perdue*, 575 F.2d 79, 80 (5th Cir. 1978). The rationale of this Court's decision in *Caputo* consisted of two lines of analysis of the coverage issues: (1) Blundo's work was performed on shore, rather than on land, only because of modern cargo-handling techniques, and (2) Caputo was an amphibious worker who, without Longshoremen's Act coverage for on shore activities, would walk in and out of coverage. 432 U.S. at 270-72. Nevertheless, the Fifth Circuit found coverage even though Ford and Bryant (1) were not amphibious workers and (2) were not performing on shore activities because of modern cargo-handling techniques.

The Fifth Circuit's decision was rendered on the urgings of the Federal Respondent who argued that the *Caputo* decision

dictates the conclusion that the term longshoring operations in Section 2(3) "includes, in effect, all terminal functions performed by a waterfront cargo-handling employer." Federal Respondent's Brief on Remand to the Fifth Circuit at 16-17. Amici disagree with the position of the Federal Respondent and the holding of the Fifth Circuit because they ignore the most functional part of coverage analysis enunciated in *Caputo*, i.e., that the text and legislative history of the 1972 Amendments demonstrated a desire to extend coverage to amphibious workers who spend at least some of their time in indisputably longshoring operations. 432 U.S. at 273.

Ford and Bryant were not longshoremen and they were not amphibious workers. They did not and could not go aboard a vessel during the course of their employment. Their work had no direct relationship to any particular vessel. Their activities — railroad loading and pier warehousing — are not traditional maritime activities. The Federal Respondent, however, continues to campaign for the widest possible expansion of coverage under the Longshoremen's Act by contending that Ford and Bryant were engaged in longshoring operations.

The activities of Ford and Bryant do not meet the definition of "longshoring operations" promulgated by the Federal Respondent prior to the enactment of the 1972 Amendments. Two definitions of "longshoring operations" adopted by the Department of Labor, in effect in 1972 and still in effect today, show that longshoring operations must have a *direct* relationship to a vessel on navigable waters:

"'Longshoring operation' means the loading, unloading, moving, or handling of, cargo, ship's stores, gear, etc., *into, in, on, or out of any vessel*." 29 C.F.R. §1504.3(i), presently §1910.16(b)(1). (emphasis added).

"The term 'longshoring operations' means the loading, unloading, moving, or handling of cargo,

ship's stores, gear, etc., into, in, on, or out of any vessel on the navigable waters of the United States." 29 C.F.R. §1918.3(i). (emphasis added).

Neither Ford nor Bryant was handling cargo into, in, on, or out of any vessel.

Amici are gravely concerned by the continued refusal of the Federal Respondent to recognize that there are limitations on coverage. The text of the 1972 Amendments and their legislative history demonstrate that not every worker on the waterfront is covered. The position of the Federal Respondent has been repeatedly proclaimed in the decisions of the Benefits Review Board and in administrative guidelines and memoranda issued by the Department of Labor. This has caused widespread underwriting unpredictability and uncertainty among the members of Amici and in the insurance industry generally.

Prior to the 1972 Amendments, there was a relative degree of certainty and predictability as to what was covered and what was not covered by the Longshoremen's Act. The expansion of the Longshoremen's Act advanced by the Federal Respondent and the Benefits Review Board has destroyed that certainty and created substantial confusion.

The Courts of Appeals have recognized the two lines of analysis used by this Court to find coverage for claimants Blundo and Caputo. By and large, they have attempted to apply one or both of them. For example, in *Handcor, Inc. v. Director*, 568 F.2d 143 (9th Cir. 1978), a member of a container stuffing gang was held to be covered, the stuffing activity onshore having resulted from the advent of containerized operations. In *Dravo Corp. v. Banks*, 567 F.2d 593 (3d Cir. 1977), a boatyard maintenance employee injured while spreading salt on the walkways was held not to be covered; he was not an amphibious worker and his onshore activities were not the result of modern cargo-handling techniques. In *Cargill*,

Inc. v. Powell, 573 F.2d 561 (9th Cir. 1977), a tipper switchman at a grain handling facility was held not covered under the Longshoremen's Act. The switchman was not an amphibious worker and he did not go on board vessels. In *Conti v. Norfolk & Western Railway*, 566 F.2d 890 (4th Cir. 1977), a brakeman at a railroad coal handling terminal was also held not covered. The brakeman was not an amphibious worker and he did not go on board vessels.

On the other hand, in two cases gearmen and mechanics who repair cargo-handling equipment were held to be covered because they were amphibious workers who do their jobs both on and off vessels: *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978); *Texports Stevedoring Co. v. Winchester*, 554 F.2d 245 (5th Cir. 1977), rehearing granted, 569 F.2d 428 (1978).

While Amici believe that the two lines of analysis enunciated in *Caputo* are not sufficiently specific to provide the insurance industry with the underwriting predictability that is required,¹ the position of the Federal Respondent ignores the limitations contained in the *Caputo* analyses, thereby promoting further confusion as to the scope of the coverage under the 1972 Amendments. Nowhere is this confusion better reflected than in the decisions of the Benefits Review Board, which has been singularly unhelpful in articulating any consistent rationale for deciding coverage cases under the 1972 Amendments. To our knowledge, the Board has not yet responded to this Court's request that the Board provide a study of the structure of work on the various piers of the country. *Caputo*, 432 U.S. at 272-73 n.34. The Board has continually disregarded the Senate and House Committees' statement that the 1972 Amendments were intended "to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part

¹ See *Longshoremen, Longshoring Operations, and Maritime Employment: A Dual Test Of Status After Northeast Marine Terminal Co. v. Caputo*, 64 Va. L. Rev. 99, 100, 113 (1978).

of their activity."² This is the excerpt from the legislative history that underpins the amphibious worker analysis enunciated in *Caputo*. 432 U.S. at 272 n. 34.

The Board has not applied the amphibious worker analysis in its post-*Caputo* decisions. Mechanics who repair cargo handling equipment have been held covered but without any mention as to whether they are amphibious workers. See, e.g., *Lewis v. Pittston Stevedoring Co.*, 7 BRBS 691 (1978); *Jameson v. Marine Terminal Corp.*, 6 BRBS 424 (1977); *Stecz v. Sealand Service, Inc.*, 6 BRBS 291 (1977). Board decisions have fostered confusion and uncertainty in the minds of hundreds of employers and their insurers who might have some connection with cargo shipments or some proximity to navigable waters.

There follow some examples of how the Board has expanded coverage since *Caputo* into industries and activities which have no direct relation to a vessel's navigation and commerce and are not traditional maritime activity: *Frisco v. Perini Corp.*, 8 BRBS 694 (1978) (piledriver employed by construction company on drydock enlargement project held covered); *Reese v. Weyerhaeuser Co.*, 8 BRBS 379 (1978) (employee of lumber company cleaning wood chips off a blowpipe from sawmill to wood chip pile held covered); *Bosarge v. Mississippi Coast Marine, Inc.*, 8 BRBS 224 (1978) (carpenter employed by small boatyard held covered); *Bakke v. Duncanson-Harrelson Co.*, 8 BRBS 36 (1978) (piledriver of construction company repairing Coast Guard dock held covered); *McNeil v. Prolerized New England Co.*, 8 BRBS 1 (1978) (employee of scrap metal processor repairing conveyor belt held covered); *Fuduli v. Maresca Boat Yard, Inc.*, 7 BRBS 982 (1978) (painter employed by small boatyard to paint pleasure craft held covered); *Carroll v. Hullinghorst Industries*, 7 BRBS 538 (1978) (carpenter building scaffolding to be used during

² S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13 (1972); H. R. Rep. 92-1441, 92d Cong., 2d Sess., reprinted in [1972] U.S. Code Cong. & Ad. News 4698, 4708.

the repair of cargo handling equipment held covered); and *Cross v. Lavino Shipping Co.*, 6 BRBS 579 (1977) (cooper who repaired boxes and barrels and who rarely went aboard vessels held covered while enlarging the receiving window in the office).

Finally, the Board has steadfastly announced that it will ignore the maritime employment status test if it would defeat coverage for an injury occurring on navigable waters.³ Thus the Board refuses to treat maritime employment status as a test for *and limitation on* coverage even though Congress specifically added the "maritime employment" requirement to §2(3) of the Longshoremen's Act when it enacted the 1972 Amendments.

This Court appreciates that while coverage has been expanded under the situs test, it has been contracted by the addition of the status test, as is shown by the discussion in *Caputo* of the new maritime employment requirement for coverage. 432 U.S. at 264. The Fifth Circuit as well has held that an employee injured over navigable waters is nevertheless not covered if he cannot meet the status test enunciated in *Caputo*. *Thibodaux v. Atlantic Richfield Company*, 580 F.2d 841 (5th Cir. 1978). The Board, however, has chosen to ignore the status test requirement when it would interfere with its design to expand jurisdiction under the Longshoremen's Act as far as possible.

The unpredictability of coverage under the Longshoremen's Act is aggravated by the concept of concurrent jurisdiction. Under this approach, an employee can file compensation claims under both the Longshoremen's Act and a state act, and the employer/insurer must process and defend two claims on the same injury. The employee is not required to elect his compensation remedy. After the employee and his attorney have seen which compensation system proves to be the most

³ See *Stewart v. Brown & Root, Inc.*, 7 BRBS 356 (1978), in which the Board reiterated its position that the 1972 Amendments do not exclude anyone who would have been covered prior to 1972.

advantageous, the employee is required to credit the employer/insurer with the benefits paid under the other system.

The Federal Respondent has fostered this additional source of coverage unpredictability by taking the position that state workmen's compensation laws and the Longshoremen's Act apply concurrently to injuries on land. See Memorandum for the United States as Amicus Curiae, *Territo v. Poche*, 339 So.2d 1212 (La. 1976), *appeal dismissed*, 98 S.Ct. 31 (1977) (No. 76-1258).⁴ In other words, the Federal Respondent would maintain that Caputo, Blundo, Ford, and Bryant were covered not only under the Longshoremen's Act, but under the state statute as well.

A final example of the uncertainty caused in the insurance industry by the unrestricted expansion of jurisdiction under the Longshoremen's Act is LHWCA Program Memorandum No. 58, published on August 10, 1977, by the Office of Workers' Compensation Programs of the Department of Labor two months after this Court's decision in *Caputo*. In stating its test for maritime employment, the Office of Workers' Compensation Programs stated:

"The test is essentially quite simple: was the injured worker employed in the waterfront cargo-handling industry, in work directly related to the cargo or to the equipment or premises used to handle it? If so, the worker had 'employee' status under Section 2(3)."

This is no test at all; it is a distortion of the statutory language, Congressional intent, and the analyses set forth in *Caputo*. It causes confusion because it is unrealistic. It refers to "waterfront cargo-handling industry," which is not an identifiable industry and does not in fact exist as an industry. The employers who come to the members of Amici for coverage are

⁴ Before the appeal was dismissed, the Solicitor General was invited by this Court to file briefs expressing the views of the United States on the appeal. 97 S.Ct. 1693 (1977).

stevedores, construction companies, scrap metal processors, terminal operators, shipyards, marinas, lumber companies, coal exporters, warehousemen, etc. The term "waterfront cargo-handling industry" is so broad and so unrealistic that it has generated substantial confusion among employers and insurance carriers as to what kinds of coverages are needed by employers. In addition, the "essentially quite simple" test proposed by the Office of Workers' Compensation Programs eliminates any relationship between the employment and a vessel's navigation and commerce. It eliminates any direct involvement with the loading and unloading of vessels. Instead of loading and unloading vessels or amphibious occupations, the Office of Workers' Compensation Programs states that the work of the employee need be related "only to the cargo or to the equipment or premises used to handle it."

Memorandum No. 58 contained other broad and expansive proclamations as to coverage. For example, the term harbor-worker was defined as including employees "whose employment is clearly identified with the water or the waterfront." Employees at marinas and recreational boat builders located near the water are also proclaimed to be covered, an action which sent shock waves through the small boating and marina industries.

II.

THE ESCALATING AND UNCAPPED BENEFITS PAYABLE UNDER THE 1972 AMENDMENTS HAVE CAUSED THE COMPENSATION EXPOSURE OF MANY EMPLOYERS AND INDUSTRIES TO BE UNINSURABLE.

The unrestricted expansion of jurisdiction is not, unfortunately, the only problem causing underwriting unpredictability. Uncertainties with regard to coverage are compounded by uncapped benefit escalation and other opened-ended features of the 1972 Amendments. The effect has been to create severe difficulties in the insurance market in providing

compensation insurance for the Longshoremen's Act. Many, many insurance companies have withdrawn from the market for Longshoremen's Act insurance and those who remain are forced to charge very high premiums. It is not an exaggeration to say that for many employers the risk is uninsurable.

The major factors which, in addition to unrestricted coverage, have caused unpredictability and uninsurable risks are the combination of the removal of ceilings on the benefits payable with the annual escalation in the rate of benefits payable and the payment of benefits for deaths unrelated to employment. These features make the Longshoremen's Act more like a veritable retirement annuity or social security than a wage replacement program. Printed in the Appendix to this Brief is a listing and summary of the provisions added to the Longshoremen's Act by the 1972 Amendments which increased the exposure of employers and insurance carriers.

Although the members of Amici have lived with unlimited benefits under many state compensation statutes for many years, the combination of the factors mentioned above has resulted in entirely new benefit utilization patterns. Amici believe that more people are claiming work related injuries and that injured persons now remain out of work for considerably longer periods of time. The annual escalation of benefits without a cap or limitation on the percent of annual escalation has made it increasingly difficult to reserve Longshoremen's Act cases with any degree of accuracy. It is essential, of course, that rate levels must be high enough to cover all future losses from accidents arising in the course of a specific policy year. The insurance industry must persuade both policy holders and state regulators what future losses are expected to be generated with some degree of accuracy. The greater the uncertainty, or potential margin of error, in the industry's measurement of current and future losses, the more difficult the persuasion job is.

Finally, the members of Amici are experiencing problems generated from the potential benefits to be paid for deaths unrelated to covered employment. Sections 8(d) and 9. It is difficult, if not impossible, to establish reserve amounts where the claimant may die from a cause unrelated to his employment.

The real-world effects of this unpredictability, uncapped and escalated compensation benefits, the drying up of the insurance market, and uninsurable risks on employers and the insurance industry were brought out in the Oversight Hearings before the House Subcommittee on Compensation, Health and Safety in 1977.⁵ Excerpts from the testimony and statements received by the Subcommittee are printed in the Appendix to this Brief for this Court to read. A summary of the key points made by some of the witnesses is, however, appropriate at this point. A witness from the State Compensation Insurance Fund of California testified that the market for Longshoremen's Act insurance had deteriorated as a result of the 1972 Amendments, subsequent decisions by the Benefits Review Board, and administrative memoranda issued by the Department of Labor. As a result, the California legislature enacted emergency legislation in 1976 to deal with the lack of available Longshoremen's Act insurance. (App. 1a-2a). A Vice-President of Fireman's Fund Insurance Company testified that the market was "tight" and that his company did not want to go out and write Longshoremen's Act insurance. (App. 3a). The Western Fish Boat Owners Association presented testimony that if the small boatyards and shoreside fish processing facilities supporting the U.S. fishing industry are subjected to the Longshoremen's Act, it would result in increased advantages to foreign fishing fleets and fish processing ships which operate off our coasts. (App. 4a). Several self-insured stevedore employers testified that

⁵ Oversight Hearings of Subcommittee on Compensation, Health and Safety of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977) (hereinafter referred to as "Oversight Hearings"). Part I of the testimony and statements has been printed and is available; Part II is expected shortly.

their self-insured retention⁶ rose from \$50,000 in 1974 to \$150,000 in 1977. These self-insured employers are also paying sharply increased premiums for the excess insurance despite the higher retention levels. (App. 4a-8a). A representative of the Shipbuilders Council of America testified that the market for Longshoremen's Act insurance is virtually non-existent and that as a result the shipbuilding industry faces an insurance crisis. (App. 8a-9a). A representative of a trade association of the recreational boating industry testified on the effect of the Department of Labor's Notice No. 21 that employees of boating facilities were covered under the Longshoremen's Act. Members of the association have been told by their insurers that they will either not write the insurance or will do so only at premiums which drive small companies out of business. (App. 1a). The problem has been recognized by an Assistant Secretary of the Department of Labor (App. 8a), but Amici have detected no change in the positions of the Federal Respondent which are causing the skyrocketing costs and the deleterious effects on the market for Longshoremen's Act insurance.

These concerns must be taken seriously by this Court. A further expansion of jurisdiction and continued uncertainty as to jurisdiction will expand and multiply the unpredictability and uninsurable risks which already exist. The tightening up of the market for Longshoremen's Act insurance is a direct product of these uncertainties. The Longshoremen's Act has become an extremely rich program. For example, assume that a longshoreman who has reached his work life expectancy of 65 receives a rating of permanent total disability and assume that he has a wife 63-years old. If he is eligible for an average compensation rate of \$200 per week, total payout over the joint life expectancy of the longshoreman and his wife will be \$286,640. It is obvious that this level of benefits for a

⁶ The primary risk which the self-insured employer must pay before excess coverage comes into play. It is akin to a large deductible.

longshoreman approaching retirement, which would be in addition to the benefits he and his wife would receive under Social Security and his normal union retirement fund, far exceed what is necessary for wage replacement.

All of these factors have affected the availability of Longshoremen's Act insurance since the passage of the 1972 Amendments. The effects on the members of Amici are restrictions on their capacity to write Longshoremen's Act insurance and difficulties in securing adequate reinsurance of what they do write. Self-insured employers have similar problems, perhaps even more severe because without Longshoremen's Act coverage they cannot stay in business.

Predictability has been affected two ways. In the first place, it is impossible to predict with any degree of certainty the effect which escalation of benefits through indexing⁷ is going to have on the total cost of a claim. Workers' compensation benefits are prefunded, and a miscalculation as to future rate of inflation may have drastic effects on the financial stability of those companies providing Longshoremen's Act insurance. The high benefit level has created such a small differential, if any, between take-home pay and compensation benefits that the incentive to return to work has been reduced, and disabilities are prolonged. Because the exposure and risk of Longshoremen's Act insurance is so unpredictable, insurance companies have shied away from it.

Insurance companies are also finding it more and more difficult to secure adequate reinsurance on their Longshoremen's Act exposure. Insurance companies find it necessary to buy insurance protection just as would any other company.

⁷ Section 6(b)(3) was added to the Longshoremen's Act by the 1972 Amendments. Pursuant to that subsection, the Secretary of Labor makes an annual determination of the national average weekly wage. As that figure increases each year due to inflation, the compensation benefits which are indexed to the national average weekly wage also increase.

Few, if any, insurance companies ever reach the point where they do not need reinsurance. Reinsurance companies are becoming increasingly cautious about accepting risks with the Longshoremen's Act exposure. They are reducing the limits they are willing to write, and they are requiring higher retention limits forcing primary insurers out of the market. Amici understand that a number of reinsurance carriers are, today, attempting to negotiate the exclusion of the escalation feature from the reinsurance provided to the primary insurers. Such limited reinsurance would be totally inadequate for primary insurers.

The unrestricted expansion of coverage has also had a detrimental effect on the administration of the Longshoremen's Act. The 1972 Amendments thrust upon the Department of Labor entirely new administrative responsibilities for which the Department was ill-prepared. An important reason explaining the long delays which have developed in the administration of the Longshoremen's Act is that a substantial number of new employers became subject to the Longshoremen's Act as a result of Benefits Review Board decisions and Department of Labor administrative memoranda. Of course, some increase was to be expected from the extension of coverage to amphibious workers injured on land, but the increase has far exceeded what was expected. In fiscal year 1976, 57 percent of all claims filed were based on claims of expanded coverage. Amici believe that most of the current administrative failures can be traced directly to the 1972 Amendments and the positions of the Federal Respondent and the Benefits Review Board in interpreting and administering the Longshoremen's Act.

III.

THIS COURT SHOULD ADOPT A CLEAR DEFINITION OF MARITIME EMPLOYMENT AND TESTS FOR COVERAGE UNDER THE LONGSHOREMEN'S ACT WHICH REQUIRE THAT THE WORK HAVE A DIRECT RELATION TO A VESSEL'S NAVIGATION AND COMMERCE OR HAVE A SIGNIFICANT RELATIONSHIP TO TRADITIONAL MARITIME ACTIVITY.

Amici urge this Court to adopt a clear test of maritime employment which requires that the work have a direct relation to a vessel's navigation and commerce or have a realistically significant relationship to traditional maritime activity. Several Courts of Appeals have adopted this approach. *See Conti v. Norfolk & Western Railway*, 566 F.2d 890, 895 (4th Cir. 1977); *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957, 961 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976). The uncertainty as to Longshoremen's Act coverage and the attendant unpredictability in the insurance industry can be remedied if this Court enunciates a clear definition of these terms.

Relying on this Court's decision and analysis in *Executive Jet Aviation, Inc. v. City of Cleveland*, the Ninth Circuit used traditional maritime activity as a test for maritime employment:

"We hold that for an injured employee to be eligible for federal compensation under LHCA, his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters,' with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in §903. *See Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972)." *Weyerhaeuser Co. v. Gilmore*, *supra*, at 961.

While Amici do not question the *Caputo* decision on its facts, it did not articulate definitive coverage tests which would guide the lower courts and halt the unrestricted expansion of coverage proposed by the Federal Respondent here and implemented by the Benefits Review Board in its decisions. The two analyses used by the Court in *Caputo* — (1) coverage for onshore activities resulting from modern cargo-handling techniques, and (2) coverage for workers in amphibious occupations in order to secure a uniform compensation system for those workers — are helpful guides, but they are not sufficient to resolve the coverage questions which arise in a variety of situations.

One commentator, writing after *Caputo*, has recognized the need for more predictable tests consistent with the *Caputo* analysis and the Congressional intent:

"Courts, commentators, and maritime employers all have recognized the importance of the problem of defining status for purposes of the LHWCA. Although the complex structure and customs of the maritime industry cloud the issues, any proposed test of status should meet at least three criteria. First, it should be consistent with the Supreme Court's opinion in *Northeast Marine Terminal*. Second, it should ratify Congress's intent in providing a federal system of compensation and in amending that system in 1972. Finally, it should allow workers, employers, and adjudicative bodies to determine simply and with certainty the status of any employee at any time." *Longshoremen, Longshoring Operations, and Maritime Employment: A Dual Test Of Status After Northeast Marine Terminal Co. v. Caputo*, 64 Va. L. Rev. 99, 100 (1978).⁸

⁸ The commentator recommended an "expanded point of rest" test. 64 Va. L. Rev. at 113-16.

The Longshoremen's Act is national in scope, and for that reason a reasonable certainty as to coverage can be established only by this Court or Congress. The Courts of Appeals have come up with several different approaches, tests, and rationales for coverage resulting in an unsatisfactory disparity in the treatment of coverage questions under the Longshoremen's Act. See *Longshoremen, Longshoring Operations, and Maritime Employment: A Dual Test Of Status After Northeast Marine Terminal Co. v. Caputo*, 64 Va. L. Rev. 99 (1978). The Benefits Review Board, quite frankly, abandoned any opportunity it might have had to establish on a national basis reasonable certainty as to coverage when it assumed through its decisions an advocate's posture for unrestricted expansion.⁹

This Court is uniquely situated to enunciate the clear and workable tests and definitions that are needed to resolve the coverage uncertainties plaguing employers and the insurance industry. In fashioning these tests and definitions, Amici urge upon the Court the following considerations:

Workers in Amphibious Occupations. This line of analysis from *Caputo* can be crystallized into a test for coverage. Amphibious workers whose assignments can take them back and forth across the water's edge during the course of a day's work are covered under the Longshoremen's Act. Non-

⁹ The confidence of employers and insurance carriers in the Benefits Review Board has not been enhanced over the years by the 424 decisions handed down prior to August 4, 1977. See Oversight Hearings at 523. An analysis of those decisions reveals that the employers/insurance carriers have not prevailed in 86% of their appeals to the Benefits Review Board:

Out of 259 Employer Appeals
Employer Prevailed in 37 decisions (14%)
Employer Lost in 222 decisions (86%)

Out of 424 total Appeals

Claimant appealed and prevailed in.....87 Board decisions (20.5%)
Claimant appealed and lost in73 Board decisions (17.2%)
Employer appealed and prevailed in.....37 Board decisions (8.2%)
Employer appealed and lost in222 Board decisions (52.4%)

amphibious workers, such as Ford and Bryant, whose assignments cannot take them across the water's edge remain covered by the applicable state workmen's compensation statute. The results of this test would be consistent with the express intent of Congress as stated in the Committee Reports "to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity."¹⁰

Maritime Employment Has A Direct Relationship To A Vessel's Navigation And Commerce. That maritime employment requires a direct relation to a vessel's navigation and commerce is illustrated by *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52 (1914). In that case, a longshoreman injured on a vessel sued his stevedore/employer for negligence, there being at the time no workmen's compensation remedy. The stevedore contested the existence of maritime jurisdiction based solely on locality and contended that the tort must also be of a "maritime nature." 234 U.S. at 61. The Supreme Court held that there was jurisdiction and emphasized the maritime relationship between the employment and the vessel:

"The libellant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with

¹⁰ S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13 (1972); H. R. Rep. 92-1441, 92d Cong., 2d Sess., reprinted in [1972] U.S. Code Cong. & Ad. News 4698, 4708.

maritime affairs as are the mariners.'" 234 U.S. at 61-62.

The direct relation to a vessel's navigation and commerce is emphasized in the definition of "maritime employment" contained in *Massman Construction Co. v. Bassett*, 30 F.Supp. 813 (E.D.Mo. 1940), *rev'd on other grounds*, 120 F.2d 230 (8th Cir.), *cert. denied*, 314 U.S. 648 (1941):

"The management of the vessel, the loading of the same, the care of its equipment and cargo, the performance of any task essential to enable it to accomplish its purpose upon navigable waters are within the term 'maritime employment.'" 30 F.Supp. at 815.

Maritime Employment Is Determined By The Primary And Actual Duties On The Day Of The Accident. The question as to the proper time frame within which to consider an employee's maritime employment *vel non* is in many cases of crucial importance. The Courts of Appeals, however, have not specifically addressed what is the proper time frame.

In *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941), the Supreme Court said that it is to be determined as of "the time of the accident." 314 U.S. at 245, 247. This was reaffirmed in *Pennsylvania Railroad v. O'Rourke*, 344 U.S. 334, 340 (1953). The Fifth Circuit's opinion in this case before remand stated that the work "at the time of the injury" controlled the employee's status. 539 F.2d at 539. The Fourth Circuit in *Conti v. Norfolk & Western Railway, supra*, referred to the employee's status "at the time of their injuries." 566 F.2d at 895.

The time of the accident is in itself an imprecise standard in that it may mean at the precise moment of the accident, or on the day of the accident, or during a particular period of time before the accident, or as measured by a comparison between the time spent in maritime and non-maritime activity over a

period of, say, a month or a year. The basic consideration is the "primary duty" and the "actual duties" of the employee. *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 260 (1940). Amici urge this Court to adopt the day of the accident as the time period in which the employment status is examined for coverage purposes. In *Cargill, Inc. v. Powell, supra*, the Ninth Circuit referred to both "the day of his injury" and "the time of the accident," but it is clear that the majority opinion considered the employee's tasks "throughout a single workday." 573 F.2d at 564. (emphasis in original).

Prior to the 1972 Amendments, the courts were faced with an analogous problem — status determination as between seamen and longshoremen, as in *Bassett*. The Ninth Circuit used the *Bassett* rubric in approving the award of LHWCA benefits to a man whose "primary duty" was that of a harbor worker and not a seaman because he worked for 29 of the 30 days of the month as a ship's caretaker. *O'Leary v. Coastal Navigation Co.*, 193 F.2d 717, 719 (9th Cir. 1951). However, the Second Circuit in *Long Island Railroad v. Lowe*, 145 F.2d 516 (2d Cir. 1944), evaluated the employee's duties as of "the day of the accident":

"The appellants, however, urge that the character of his employment cannot be properly determined unless his work during the entire period of his employment be taken into consideration, and that it was on this basis the Deputy Commissioner reached his conclusion that the decedent was a longshoreman rather than a member of the crew. In this we think error in a matter of law was committed. The employee's duties *on the day of the accident* are the critical facts which should determine his status as a member of the tug's crew. It is true that if he had been called aboard for a single act of service, he might not become a member of the crew. But on the days when his employer assigned him to serve as 'mate' of the vessel, we hold that he was a crew

member, although he might cease to be one on days when he was assigned for other duties. We can perceive no reason in the words or purpose of the Compensation Act for lumping an employee's activities over the period of his employment and classifying him according to the greater number of days on which he was either seaman or longshoreman." 145 F.2d at 518 (emphasis added).

The *Lowe* decision was cited with approval in *Pennsylvania R. Co. v. O'Rourke, supra* at 340 n. 5.

Traditional Maritime Activity. Judicial construction of shoreside extension of coverage under the 1972 Amendments should parallel development of the "traditional maritime activity" required by *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). The Supreme Court made a complete review of admiralty and maritime tort jurisdiction in *Executive Jet*, and there is a striking similarity between what the Court did in that case in 1972 and what Congress did in the 1972 Amendments. Prior to *Executive Jet* admiralty jurisdiction was based on situs. Prior to the 1972 Amendments the LHWCA coverage was based on situs. Congress added the "maritime employment" status test for employee coverage in the 1972 Amendments, and the Supreme Court required "traditional maritime activity" for admiralty tort jurisdiction in its 1972 decision. The Court said:

"In sum, there has existed over the years a judicial, legislative, and scholarly recognition that, in determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test."

* * *

"It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity."

* * *

"We can find no significant relationship between such an event befalling a landbased plane flying from one point in the continental United States to another, and traditional maritime activity involving navigation and commerce on navigable waters." 409 U.S. at 262, 269, 273.

"Maritime employment" embodies the same fundamental concepts that the Supreme Court brought to jurisdictional analysis with the requirement for "traditional maritime activity."

Perhaps the most clearly articulated general test for determining maritime employment was that offered by the Ninth Circuit in *Weyerhaeuser Co. v. Gilmore, supra*. In holding that a "pondman" whose job was to feed floating logs on navigable waters into a sawmill was not engaged in maritime employment, the Court stated:

"The Board's erroneous conclusion that Claimant is entitled to LHCA benefits stems from a misinterpretation of the frequently stated 'expansion' of coverage by the 1972 amendments. This expansion refers only to the broadened definition of 'navigable waters,' (maritime jurisdictional requirement) which now includes 'adjoining' piers and other areas prescribed in §903(a). In expanding the maritime situs element of the Act, however, Congress clearly did not intend to broaden the class of covered employees to include *anyone* injured in an adjoining area. This intent is manifest in the legislative history." 528 F.2d at 960.

The same thought was again expressed by the Court, but in somewhat different language:

"Accordingly we believe that to be entitled to the benefits of LHCA, an employee's employment must have a realistic relationship to the traditional work and duties of a ship's service employment. Otherwise the clear and unambiguous congressional language of 'maritime employment' is nullified and rendered to read 'any employment.'" 528 F.2d at 961.

In deciding the instant cases this Court might well take note of the Ninth Circuit's insistence that "maritime employment" must have a "realistic relationship to the traditional work and duties of the ship's service employment." In the next paragraph the Ninth Circuit speaks of "a realistically significant relationship of 'traditional maritime activity involving navigation and commerce on navigable waters,'" 528 F.2d at 962. Finally, the Ninth Circuit noted that there was absent in Gilmore's employment "any realistically substantial relationship . . . to navigation or commerce upon navigable waters." 528 F.2d at 962. The "traditional maritime activity" rubric comes directly from *Executive Jet*. Amici believe, with the Ninth Circuit, that the principle of *Executive Jet* is useful, if not dominant, in fashioning workable definitions and tests for coverage under the Longshoremen's Act.

The Section 20(a) Presumption Does Not Apply To Jurisdictional Issues. The Fifth Circuit stated in its opinion prior to remand that it was "bound" by the presumption in Section 20(a). *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d at 541. However, the presumption is not applicable to basic questions of statutory interpretation and jurisdiction. The First and Second Circuits have held that the presumption does not apply to jurisdictional issues. *Stockman v. John T. Clark & Son*, 539 F.2d 264, 269 (1st Cir. 1976); *Pittston Stevedoring Corp. v.*

Dellaventura, 544 F.2d 35, 48 (2d Cir. 1976). Judge Friendly, writing for the Second Circuit, has said:

"The claimants, the Solicitor of Labor, and the ILA place great reliance on a provision in the LHWCA as originally adopted in 1927, 33 U.S.C., §920 . . . They contend that if the meaning of the new coverage provision, 33 U.S.C., §903, is in any way doubtful, this presumption requires the doubt to be resolved in favor of coverage. We do not think this was what Congress had in mind; the very fact that the presumption can be overcome by substantial contrary evidence indicates its inapplicability to an interpretive question of general import such as this." *Pittston, supra* at 48.

CONCLUSION

The decision below should be reversed in an opinion by this Court which halts the unrestricted expansion of coverage under the 1972 Amendments and articulates clear and definitive tests for establishing coverage with reasonable predictability and certainty.

Respectfully submitted,

DAVID R. OWEN,
FRANCIS J. GORMAN,
Attorneys for Amici Curiae,
10 Light Street,
Baltimore, Maryland 21202.

Of Counsel:

SEMMES, BOWEN & SEMMES,
Baltimore, Maryland.

January 11, 1979

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-425

P.C. PFEIFFER COMPANY, INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioner,

v.

DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents,

and

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

v.

WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX
TO THE BRIEF OF THE ALLIANCE OF AMERICAN
INSURERS, THE NATIONAL ASSOCIATION OF
INDEPENDENT INSURERS, AND THE AMERICAN
INSURANCE ASSOCIATION, AS AMICI CURIAE

TABLE OF CONTENTS

	<u>Page</u>
Excerpt from the testimony of Quentin Lewton, Richmond Boat Works, accompanied by Alan Bonnified, Larry Dobbins, and Bill Gray	1a
Excerpt from the testimony of Brian Jessick, State Compensation Insurance Fund	1a
Excerpt from the testimony of John C. Richman	2a
Excerpt from the testimony of Zeke Grader, accom- panied by Pat Flanagan and Kairos Varner.....	4a
Excerpt from the Prepared Statement of Albert Kelley, Jr., Treasurer, John T. Clark & Son	4a
Excerpt from the Prepared Statement of John M. Walton, III, Secretary, Lavino Shipping Co.	5a
Excerpt from the Prepared Statement of Walter D. O'Hearn, Jr., President and Chief Executive Offi- cer, McGrath Services Corp.	6a
Excerpt from Insurance ADVOCATE, July 23, 1977, included with the Prepared Statement of Albert J. Millus, Executive Director of the State Insurance Fund (New York).....	8a
Excerpt from the testimony of Stewart E. Niles, Jr., Special Counsel, Shipbuilders Council of America ..	8a
Excerpt from the testimony of John F. McKay, Chair- man, Shipyard Committee, American Waterways Operators, Inc.	9a
Excerpt from the testimony of Dennis Lindsay, Coun- sel for the Master Contracting Stevedore Associa- tion of the Pacific Coast, Inc.....	10a
Excerpt from the statement of Stanley M. Broudy, Vice-President, Crescent Wharf and Warehouse Co.	14a
Excerpt from the statement of George F. Reall, President of The National Council on Com- pensation Insurance.....	15a
Excerpt from the statement of American Insurance Association.....	16a
Summary of the changes in the 1972 Amendments	16a

Appendix

Excerpt from the testimony of Quentin Lewton, Richmond Boat Works, accompanied by Alan Bonnified, Larry Dobbins, and Bill Gray:

* * *

The association appreciates the opportunity this morning to present testimony on a problem that is crippling recreational boating in California. That problem simply stated, is this: The Department of Labor has interpreted the 1972 amendments to the Longshoremen's Act so as to include the recreational boating industry. Insurance companies have followed the Department of Labor's interpretation, as embodied in notice 21 issued on June 6, 1975. Because of a lack of claims experience and uncertain insurance company exposure, these insurance companies have either refused to provide Longshoremen's and Harbor Workers' Compensation Act coverage to the recreational boating industry or have only done so at premium rates which have driven many small companies out of business. Oversight Hearings at 3.

* * *

Excerpt from the testimony of Brian Jessick, State Compensation Insurance Fund:

* * *

I appreciate this opportunity to testify regarding a subject of serious concern to the subcommittee and to ourselves and many others: the availability of U.S. Longshoremen's and Harbor Workers' coverage for maritime employers.

As you know, the California legislature enacted emergency legislation in mid-1976 to deal with a lack

of available insurance protection for employers subject to the U.S. Longshoremen's and Harbor Workers' Act as this market problem had reached crisis proportions in California.

The market for this insurance had begun constricting following 1972 amendments to the act, and had further deteriorated after the promulgation of subsequent U.S. Department of Labor decisions. *Oversight Hearings* at 96.

* * *

Excerpt from the testimony of John C. Richman:

* * *

A number of people today have talked about the problem with the death benefits and the escalation or indexing provision whereby benefits are increased on an annual basis according to the change in the national weekly wage. We have a case which perhaps illustrates this particular point. We have a widow with a life expectancy of 47 years. Our original unescalated cost of this case is \$505,000. If we escalate it at 5 percent, the cost becomes \$1,994,000. If this should be 6 percent, it would be \$2,721,000. What if it were 10 percent? Who knows what the ultimate effect of inflation will be over the next 20 or 30 or 40 years? Again, there is just a lot of uncertainty.

While it sounds right and proper to take care of widows in this fashion, is it really equitable? Is there equitability in guaranteeing anyone annual income increases of 5 or 6 or 10 percent a year for the rest of their lives? I don't have such a guarantee and I don't suspect the Members of Congress do either. In addition, this may be a practice that society cannot

afford. It may very well be too expensive. At the very least, the U.S. Longshoremen's and Harbor Workers' Compensation Act needs to be changed to limit the escalation provision to a reasonable and predetermined amount.

* * *

The second aspect of the jurisdictional question regards the extension of the act to shoreside businesses, and that is what you have heard a lot about today. In my opinion, while the act does not apply to the worker painting the center line down the roadway on a bridge, nor to a waiter in a restaurant located on pilings over navigable waters, it appears to me that only an extremely conservative reading of the words in the law would indicate that marinas and boatyards situated adjacent to navigable waters are not now within the scope of the act. Obviously some persons do not agree and there is a very good question about the intent of the legislation. Again, this merely highlights the uncertainty and the ambiguity. Be that as it may, the fact is that the possibilities are such that the price for insurance that these businesses will pay must reflect the benefit structure of the act. Again, I would say, as others have said, there is a crying need for the Congress to define the term "maritime employment."

* * *

The market is tight and underwriters, including the Fireman's Fund, are not very happy about writing this business, basically because, as some one has said, you don't get a lot of premium and you could get a million dollar loss very easily. While we are in the business and we are a broad insurer, we don't go

out and seek Longshoremen's and Harbor Workers' business. Oversight Hearings at 100, 101 and 103.

* * *

Excerpt from the testimony of Zeke Grader, accompanied by Pat Flanagan and Kairos Varner:

* * *

If the fishing industry is to remain under the Longshoremen's and Harbor Worker's Act, as the Department of Labor's 1975 interpretation of the 1972 amendments would do, there quite likely will be no expansion of our shoreside processing facilities. Instead, we will continue to watch foreign processing ships operate off our coast. Instead of the construction of new U.S. midwater trawlers, we can expect to watch the continued harvest off our coasts by foreign fleets as our own fleets will lack the ability to harvest new species. If the Longshoremen's and Harbor Workers' Act continues to be applied to the fishing industry, we quite likely will watch a contraction of this vital industry. Many persons will be laid off as companies find they can no longer pay these insurance rates and the consumer will be forced to pay unnecessarily higher prices for fish. Oversight Hearings at 160-161.

* * *

Excerpt from the Prepared Statement of Albert Kelley, Jr., Treasurer, John T. Clark & Son:

* * *

A little over a year ago we were in a meeting with a number of high officials of the Department of Labor in Washington and we related our company's experience in attempting to obtain competitive quotations in early 1976 for mid-year renewal of our

Workingmen's Compensation insurance. (Our insurance brokers contacted 17 companies on our behalf, 14 of whom said they were not interested in writing Longshore and Harbor Worker's Compensation Act coverage. Our present insurer and two other companies responded positively. Later one of the companies said they were unable to consider the underwriting because they were over-capacity. The other company was not competitive with our present carrier as they would only write a high maximum retrospective plan).

All that the Department of Labor officials could suggest was that the government should in effect get into the insurance business and that they were very receptive to initiating a program within the Department of Labor. Oversight Hearings at 367.

* * *

Excerpt from the Prepared Statement of John M. Walton, III, Secretary, Lavino Shipping Co.:

* * *

The attached Exhibit No. 2 sets forth the recent history of the pure cost of the program on a per claim basis. You will note that in 1973 the pure cost per claim under our \$25,000 retention increased 65.2% over the prior year. This dramatic increase can be attributed to the 1972 amendments to the Longshore Act. In addition to the substantial increase in the pure cost per claim in 1973, the cost for excess workers' compensation insurance went up 87% over 1972's cost. As noted, the self-insured retention was increased from \$25,000 to \$50,000 on January 1, 1974 and then to \$150,000 on January 1, 1977. The combination of these increases has caused the average total cost per claim to go from \$1,867 in 1972 to

\$3,046 in 1976. Keep in mind that these costs are only for claims under the self-insured retention. Nothing has been factored in for claims which have exceeded the retention.

When the cost of claims increase, bond requirements increase, the cost of excess insurance increases and self-insured retention increases. Although not previously mentioned, the cost of administering the claims to comply with the Act has increased dramatically. Finally, markets for both self-insured bonds and excess insurance is shrinking. Fewer and fewer insurance companies are willing to entertain a self-insured stevedores' excess compensation risk. Only two companies were willing to entertain our risk this past January compared with half a dozen or so in prior years. Oversight Hearings at 425-426.

* * *

Excerpt from the Prepared Statement of Walter D. O'Hearn, Jr., President and Chief Executive Officer, McGrath Services Corp.:

* * *

The major problem with the Act is that three provisions contained therein make it impossible for insurance companies to actuarially compute risk. This has occasioned a massive withdrawal by insurance companies from private coverage under the Act. We have provided the staff with a list of insurance companies which have recently informed McGrath of their refusal to provide primary and/or excess insurance coverage under the Act.

* * *

MEMORANDUM

TO Walter D. O'Hearn, Jr. December 27, 1976
 FROM John W. Dorsey
 Re: Workmen's Compensation Coverage Primary & Excess.

Pursuant to your request the following carriers have refused to quote any price for the issuance of policies affording the above captioned coverage.

1. Primary Compensation including U.S.L.H.

Aetna Casualty & Surety	INA
American Home	Maryland Casualty
Bituminous Casualty	Royal Insurance
Chubb & Son	St. Paul
Continental Insurance Co.	Travelers
CNA	U.S.F. & G.
Crum & Forster	Employers of Texas
Employers of Wausas	Midland
Firemens Fund	
American	Kemper Group
Great American	Argonaut
Houston General	Mission
Home Insurance Co.	

2. Excess Compensation including U.S.L.H.

CNA	Aetna
Atlantic Mutual	Chubb & Son
Home Insurance Co.	Continental Insurance Co.
Employers of Wausas	Dependable Insurance Assoc.
Crum & Forster	Firemans Fund
Great American	Hartford
Highlands Insurance	INA
Maryland Casualty	Ranger
Royal Globe	St. Paul
Travelers	U.S.F. & G.

First State
American Reins.
Inter State
Ranger
Cal Union

Wausas Surplus
Northeastern Fire
General Reins.
Bellefonte
North Brook

Oversight Hearings 453, 462.

* * *

Excerpt from the Letter of Donald Elisburg, Assistant Secretary, U.S. Department of Labor in the Insurance ADVOCATE, July 23, 1977, included with the Prepared Statement of Albert J. Millus, Executive Director of the State Insurance Fund (New York):

4. As indicated in the article, the availability of and rates of insurance for Longshore Act coverage have been a serious problem for employers covered by the Act. The Department views this adverse development with grave concern, and is presently reviewing proposals submitted by private contractors to conduct an extensive study of the entire Longshore Act problem. We hope thereby to obtain insight for developing initiatives, if possible for providing relief to employers, either within the present framework of the law or, if necessary, through recommending legislation. Oversight Hearings at 503.

* * *

Excerpt from the testimony of Stewart E. Niles, Jr., Special Counsel, Shipbuilders Council of America:

The financial burdens are graphically illustrated by the insurance crisis which the shipbuilding industry faces solely as a consequence of this act. To avoid repetition on matters on which this committee has already heard testimony, it suffices to say that the

insurance market for L. & H. coverage is virtually nonexistent. Oversight Hearings at 573.

* * *

Excerpt from the testimony of John F. McKay, Chairman, Shipyard Committee, American Waterways Operators, Inc.:

No matter which part of the industry you examine, every company is having extreme difficulty in obtaining LHWCA coverage. The shipyards which are part of larger companies can usually obtain coverage because of the pressure they can exert through the aggregate insurance business of their parent company. However, even they are forced to accept *dangerously large deductibles*. The independent shipyards must obtain coverage in the market or through self insurance.

Several months ago, the firm of Marsh and McLennan (insurance brokers) canvassed 56 insurance companies which have written LHWCA insurance in the past. Only three of the 56 companies confirmed that they will selectively write such insurance. The others indicated that they simply will not write LHWCA in the future.

Self insurance is not a satisfactory answer either, because in reality it is no insurance at all as far as the company is concerned. It is only a desperate measure to keep the gates open. As a general rule, companies with a payroll of less than \$5,000,000 should not even attempt self insurance. Thus, any company which has its insurance cancelled is at the brink of disaster.

The first industry survey conducted by the American Waterways Shipyard Committee for the years 1971-1975 indicated that approximately 55 companies went out of business during those years.

The preliminary results of the shipyard survey for the year 1976 indicate that 31 more shipyards have gone out of business. In many instances, the reason given by the respondents was the Longshoremen's and Harbor Workers' Act.

Many companies in our industry have in their titles such designations as "welding and machine company", "bridge company", "engineering", "iron works", and "boiler works". These companies have relied on non-maritime construction work to even out the cycles of the marine construction and repair business. Employees are involved in both maritime and non-maritime construction, and during the course of a day, they may actually be engaged in either occupation. The employer must therefore carry both state compensation and LHWCA insurance for that employee. Because of the exorbitantly high premiums of the LHWCA, many companies in our industry are non-competitive with their counterparts who are not involved in the marine business. As a result, the financial and business stability so necessary to the survival of some of our shipyards is no longer there. Oversight Hearings at 602.

* * *

Excerpt from the testimony of Dennis Lindsay, Counsel for the Master Contracting Stevedore Association of the Pacific Coast, Inc.:

* * *

Let us start at the beginning. A major problem we see in the industry is the question of insurance, its availability and cost. The bottom line here is that to stay in business, under the act you have to have insurance, whether it is primary or excess. In other words, you must have an insurance company back

you or you must go self-insured, one or the other. Because without it you cannot continue in business.

Our problem is, prior to the 1972 Amendments we had competitive insurance available to us, whether we wanted to go primary, whether we wanted to put up the premiums and let the insurance company carry it, or if you wanted to go self-insured because you were large enough you thought you had a better control of the claims. As a self insured you need an excess market available to you.

In the testimony, the bottom line is that is no longer the case. The men here will specifically individualize their own situations as to why they cannot get primary other than Mr. Westfall, who, I guess, is the last stevedore except one on the west coast that has primary, and he will tell you what his problems are.

The rest of the men are under self-insurance now, and the excess market has just about dried up. And to the extent that it has not, the rates are what they believe to be too expensive, and it seems to be getting worse.

* * *

All employers subject to the Longshoremen's and Harbor Workers' Compensation Act are required to obtain insurance with an insurance company authorized by the Office of Workers' Compensation Programs or to receive authorization to become self-insured. Few employers and no members of the Association are large enough to wholly self-insure their Longshoremen's and Harbor Workers' Compensation Act exposure. All Association members must therefore obtain either "primary" or "excess" insurance.

Before the 1972 Amendments, the primary and excess insurance alternatives available to the members of the Association were numerous. Many insurance companies actively sought and competed for Association accounts. In fewer than five years, the situation has changed dramatically.

Even with Longshoremen's and Harbor Workers' Compensation Act primary insurance premiums approaching the level of \$35 to \$40 per hundred dollars of payroll, very few insurers remain willing to underwrite Longshoremen's and Harbor Workers' Compensation Act exposures.

A 1976 study of the insurance market conducted by an international insurance broker for one of the larger members of the Association disclosed that 32 of 43 insurers who provided Longshoremen's and Harbor Workers' Compensation Act coverage before the 1972 amendments would no longer "write the class". Of the remaining eleven former insurers, only four offered primary coverage, all for premiums that the members' viewed as "out of line." The remainder of the available insurance market restricted its interest to excess policies. Only one potential excess insurer required less than a \$3,500,000 underlying "retention."

There is no indication that the insurability of Longshoremen's and Harbor Workers' Compensation Act risks has improved in 1977. We believe the situation has worsened, and that insurance absolutely necessary for the functioning of the Longshoremen's and Harbor Workers' Compensation Act has become almost impossible to obtain for any price and, in those few instances in which insurance is available, obtainable only at a cost far exceeding what industry views as reasonable.

Insurance has become virtually unobtainable because the current Act provides no basis for reasonable forecasting of potential liability. Insurance premiums and costs of self-insuring have become unaffordable because (a) the Longshoremen's and Harbor Workers' Compensation Act has become a public social insurance program bearing only limited relation between work-related hazards and ultimate liability and (b) the 1972 Amendments have vastly increased the cost of delivering appropriate medical care and compensation to injured workers and their survivors and have made a speedy resolution of disputes impossible.

The Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, is touted by many persons as a "model Act" against which all other workers' compensation programs are to be compared and found deficient. As employers with long experience with this Act and its effects, we suggest that it must not serve as a model for any further legislation before current glaring deficiencies are corrected.

Three major factors underlie the current serious deficiencies.

I. Insurance is an integral part of any workmen's compensation scheme. The 1972 Amendments have caused Longshoremen's and Harbor Workers' Compensation Act liability to become virtually uninsurable.

II. A workers' compensation program is distinguished from public insurance by the existence of a relationship between hazards of employment and ultimate liability. The current Act has lost that essential relationship and has instead become a public social insurance pro-

gram bearing little relationship to the hazards of waterfront employment.

III. The 1972 Amendments were designed to substitute certain increased compensation benefits for the uncertain results of litigation and were intended to solve the social costs of that litigation, the attendant delays and crowding of court calendars and the need to pay for lawyers' services. The 1972 Amendments have, instead, vastly increased the costs of delivering appropriate medical care and compensation benefits to injured workers and their survivors and have foreclosed opportunity for speedy resolution of disputed claims. Oversight Hearings at 631-632, 713-715.

* * *

Excerpt from the statement of Stanley M. Broudy, Vice-President, Crescent Wharf and Warehouse Co.:

* * *

Since the 1972 Amendments were passed by Congress, self-insurers and companies falling under the jurisdiction of the Longshore and Harbor Workers' Compensation Act, have had extreme difficulty in purchasing either primary or excess coverage. The reasons are quite obvious. Basically, the insurance industry does not consider the maritime industry, from an underwriting standpoint, to be a profitable risk because of the very liberal benefits that currently exist under the Longshore and Harbor Workers' Act and because in cases involving death claims and permanent and total disability, an insurance carrier cannot adequately determine its ultimate costs, and therefore, cannot adequately establish reserves. The more specific areas will be discussed later in my testimony. Oversight Hearings at 771.

* * *

Excerpt from the statement of George F. Reall, President of The National Council on Compensation Insurance:

* * *

At this point, we would like to comment on certain aspects of the insuring of benefits under the Longshoremen's Act which have commanded the particular attention of our actuaries and underwriters. For example, when the law, in its present form, was enacted in late 1972, it not only expanded the benefits substantially, but it created new questions of coverage which had to be considered. Some of these questions have only recently been settled. An unsettled situation of this type has made it very difficult for the insurer to understand and value the cost of coverage afforded.

Since the law, in its present form, is relatively new, the statistical data base on which rates are to be determined, classification by classification, is not adequately matured. Uncertainty of coverage, mentioned just above, must resolve itself over time. Also, the various financial and sociological impacts which affect the ultimate cost of benefits, especially where they have been suddenly and substantially expanded, have not emerged clearly yet in the statistical data base. This causes the actuaries particular concern as to the correct estimation of rates where the ratemaking process is necessarily objective, with minimal use of subjective judgment being the rule. Underwriters, of course, know all this and this tends to control their enthusiasm for writing coverage. Oversight Hearings at 827.

* * *

Excerpt from the Statement of American Insurance Association:

* * *

JURISDICTION

When the Longshoremen's Act was initially enacted it was to fill a void resulting from court decision which held the state workmen's compensation system was not applicable on navigable waters of the United States. The 1972 amendments greatly expanded the jurisdiction of this Act beyond the water's edge. It is still extremely unclear just where the Longshoremen's Act exposure exists. Nearly five years after the enactment of the 1972 amendments the U.S. Supreme Court handed down its decision in the case of *Northeast Marine Terminal, Inc. v. Caputo*. This has provided a certain degree of clarification with regard to stevedoring operations. There is, however, still a large degree of uncertainty with regard to other types of operations, in particular, recreational boat building and marinas. These, of course, are usually small operations and it is hard to believe that anyone envisioned such operations as coming within the scope of the Longshoremen's Act when it was originally enacted in the 1920's. A great deal of uncertainty would be removed if this Subcommittee provided a more specific definition of maritime employment and clearly established the scope of this Act. Oversight Hearings at 858-859.

* * * * *

SUMMARY OF THE CHANGES IN THE 1972 AMENDMENTS

The following provisions were added by the 1972 Amendments and increased the liability of employer/insurance carriers

for compensation and medical benefits payable to injured employees and their dependents:

Section 2(3)	—expanded the definition of "employee" to increase coverage.
Section 2(4) and Section 3(a)	—expanded the definition of "navigable waters" to increase coverage.
Section 2(14) and Section 2(18)	—the definition of "dependent child" now includes a college student up to age 23 whereas prior to the 1972 Amendments the cut-off date was 18 unless a child over 18 was wholly dependent on the employee and incapable of self-support by reason of mental or physical disability.
Section 6(a)	—compensation is now payable for the first 3 days of disability if the disability lasts more than 14 days, whereas prior to the 1972 Amendments an employer/insurance carrier was not liable for the first 3 days of disability unless the disability lasted more than 28 days.
Section 6(b)	—the maximum weekly compensation payable is now 200% of the national average weekly wage, whereas before the 1972 Amendments the maximum was a flat \$70 per week.

18a

Section 6(b)(3) —the national average weekly wage maximum is escalated each year to an amount determined by the Secretary of Labor.

Section 6(d) —the higher maximum under the national average weekly wage applies to those persons who were receiving compensation benefits for permanent total disability or death at the time the 1972 Amendments were enacted.

Section 8(c)(23) —after an injured employee who has a permanent partial disability has received his scheduled award, the injured employee may then receive compensation for loss of wage-earning capacity, i.e., two-thirds of the difference between the employee's average weekly wage before the injury and his wage-earning capacity after the injury.

Section 8(d) —death benefits are payable to the survivors of an employee receiving compensation for permanent partial disability even though the employee died from causes unrelated to the injury which caused the permanent partial disability.

Section 9 —death benefits are payable to the survivors of an employee receiving compensation for permanent total disability even though the employee died from causes unrelated to the injury which caused the permanent total disability.

19a

Section 9(a) —funeral expenses are now payable up to \$1,000, whereas before the 1972 Amendments the limit was \$400.

Section 9(b) —death benefits payable to a widow or widower without dependent children is now 50% of the average wages of the deceased employee, whereas before the 1972 Amendments the death benefits were 35% of the deceased employee's average wages.

Section 9(f) —the compensation or death benefits payable for permanent total disability or death are now increased each year by the percentage which the national average weekly wage increased from the preceding year. This is a totally new subsection to Section 9.

Section 12(a) and Section 13(a) —the time for giving notice of injury or death and the time for filing claims for injury or death have been liberalized in that the time periods do not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment. This may be a significant provision in the current wave of asbestosis cases.

Section 14 —the \$24,000 maximum on compensation payable to an employee for temporary total, permanent partial, or temporary partial disability was eliminated by the 1972 Amendments. This \$24,000 maximum was in former subsection (m) of Section 14.

Section 19(d) and Section 21 (b) —all disputes are now resolved in adversary proceedings before Administrative Law Judges and a newly created Benefits Review Board.

Section 28 —employer/insurance carriers must now pay attorney's fees to attorneys who represent injured employees or dependents in connection with contested compensation claims if the employer/insurance carrier was unsuccessful on the contested issue.

Section 44(c)(1) —the employer/insurance carrier now pays \$5000 into the special fund in all compensable death cases where there is no person entitled to receive the compensation benefits for death, whereas before the 1972 Amendments the employer/insurance carrier paid only \$1000 into the special fund.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-425

P. C. PFEIFFER Co., Inc. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

v.

DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents.

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

v.

WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF OF INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION AS AMICUS CURIAE IN SUPPORT OF THE JUDGMENTS BELOW

Of Counsel:

LEONARD & PATSEY
1182 Market Street
San Francisco,
California 94102

NORMAN LEONARD

1182 Market Street
San Francisco, California 94102

*Attorney for International
Longshoremen's and
Warehousemen's Union,
Amicus Curiae*

SUBJECT INDEX

	<u>Page</u>
Introduction	1
The facts	3
Northeast marine terminals	5
What is maritime employment	7
The proposal of amicus	10
Conclusion	12

TABLE OF AUTHORITIES CITED**Cases**

Cargill, Inc. v. Powell, 573 F.2d 561 (9th Cir. 1978) (Pet. App. 60, n. 2), cert. pending, No. 77-1543	4
Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533 (5th Cir. 1976) (Pet. App. 46)	3
Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977)	passim
Sea-Land Services v. Director, Office of Workers' Compensation Programs, 540 F.2d 629 (3rd Cir. 1976)	12
Shipowners Association of Pacific Coast, et al., 7 NLRB 1002, 1041 (1938)	2
Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917)	10

Statutes

Longshoremen and Harborworkers' Act, 1972 Amendments:	
33 U.S.C. 901 et seq.	2, 3, 7, 9
33 U.S.C. 902(3)	3

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-425

P. C. PFEIFFER Co., INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

v.
DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents.

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

v.
WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

**BRIEF OF INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION AS AMICUS CURIAE
IN SUPPORT OF THE JUDGMENTS BELOW**

INTRODUCTION

The International Longshoremen's and Warehousemen's Union (*amicus*) is the certified collective bargaining representative of "workers who do longshore work in the

Pacific Coast ports of the United States" for West Coast shipping, stevedore and terminal companies and their agents. *Shipowners Association of Pacific Coast, et al.*, 7 NLRB 1002, 1041 (1938). The employees it represents are engaged in "the old-fashioned process" (*Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 272 [1977]) of handling break bulk cargo on the Pacific Coast waterfronts as well as in the stripping and stuffing of containers and in the clerical functions related to both operations.

The Union's concern here, on behalf of these employees, is that the Court shall not enunciate a rule which will deprive them of the coverage which, by the 1972 amendments to the Longshoremen and Harborworkers' Act, 33 U.S.C. 901 et seq. (the Act), Congress intended they should have, and that no line shall be drawn which will exclude any such workers from that coverage. To that end, this brief will review the background of the present case and the proposals of the Director of the Office of Workers' Compensation Program and of Petitioners, and will suggest a test for determining maritime employment which *amicus* believes comports with the Congressional objectives in adopting the 1972 amendments.

Since the decision in *Northeast Marine, supra*, makes it perfectly clear that employees engaged in the stripping and stuffing of containers and the clerical work related thereto are covered and since the petition in this case raises the question of coverage only in so far as it affects employees engaged in non-containerized operations (Brief for Petitioners, 3-4), *amicus* will examine tests proposed to determine when employees engaged in such break bulk opera-

tions are covered by the amendments and will propose what *amicus* believes is a test which should be adopted by the Court.

THE FACTS

By the 1972 amendments to the Act, Congress extended coverage to "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations . . ." 33 U.S.C. 902(3).

The questions presented by this case are whether two workers who were injured in separate accidents, under the circumstances described below, were engaged in such employment.¹

1. Respondent Ford was injured while "helping to secure a military vehicle to a railway flatcar in preparation for its transportation inland. The vehicle . . . had arrived . . . [several] . . . days prior to the accident. Since then it had remained in the immediate waterfront area. On the day before the injury, a gantry crane at the water's edge had lifted the vehicles onto the flatcars." *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 543 (5th Cir. 1976) (Pet. App. 46).² The court of appeals held that the work Ford was performing at the time of his injury was "the last step in transferring this cargo from sea to land trans-

¹There is no question here that the "situs" of each accident meets the tests laid down by the Court in *Northeast Marine, supra*, at 264-265, 279-281. (Brief for Petitioners, 7 n. 11)

²This is the original decision of the court of appeals in this case which was remanded, 433 U.S. 904 (1977), for further consideration in light of *Northeast Marine* (Pet. App. 29). It is reproduced at Pet. App. 30-55. Since the decision of the court of appeals on remand, 575 F.2d 79 (5th Cir. 1978), which is the subject of the instant proceeding (Pet. App. 27-28), did not restate the facts, we take them from the original decision.

portation" (*ibid.*) and was "an integral part of the process of moving maritime cargo from ship to land transportation" (*ibid.* at 47). It therefore affirmed the decision of the Benefits Review Board that Ford was entitled to benefits under the Act, rejecting the contention that coverage should be denied "because of a discontinuity in time created by the cargo's having been stored for a while along the shore." (*ibid.*).

2. Respondent Bryant was injured while working "in a warehouse immediately adjacent to a pier . . . [where] loads of cotton are first deposited at various shoreside warehouses by inland shippers. The cotton is then placed on dray wagons and taken to pier warehouses such as the one where Bryant was injured. The work performed by Bryant and other 'cotton headers'³ is to unload the bales of cotton and stack them in pier warehouses . . . Generally, the cotton remains in the warehouses until other employees . . . take it on board ship." (*ibid.* at 48). The court of appeals affirmed the award of benefits to Bryant, holding that since he would have been directly involved in "longshoring operations" if, "instead of setting the cargo down, he had handed it to 'longshoremen' for immediate loading on board a ship", the "discontinuity in time created by the cotton's temporary storage did not alter the essential nature of [his] work, which was an integral part of moving cargo between land transportation and a ship." (*ibid.* at 49-50).

³The fact that respondent Bryant was a member of a "cotton headers" local while other employees were members of a "longshoremen's" local is of no significance. *Northeast Marine, supra*, at 268, and n. 30; *Cargill, Inc. v. Powell*, 573 F.2d 561, 563, n. 2 (9th Cir. 1978) (Pet. App. 60, n. 2), cert. pending, No. 77-1543.

NORTHEAST MARINE TERMINALS

1. The point of departure here is, of course, the Court's decision in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). There the Court held that a worker injured under the following circumstances was covered by the amendments:

"On April 16, 1973, Caputo was hired by Northeast to work as a 'terminal labor[er]'. . . . A terminal laborer may be assigned to load and unload containers, lighters, barges, and trucks. . . . When he arrived at the terminal, Caputo was assigned, along with a checker and forklift driver, to help consignees' truckmen load their trucks with cargo that had been discharged from ships at Northeast's terminal. Caputo was injured while rolling a dolly loaded with cheese into a consignee's truck." 432 U.S. at 255 (footnotes omitted)⁴.

The instant case presents once again the question of coverage for employees engaged, as was Caputo, in "the old-fashioned process of putting goods already unloaded from a ship or container into a delivery truck" (432 U.S. at 272) or a railroad car, or vice versa.

It is the submission of *amicus* that, for the purposes of this case, there is no meaningful or significant distinction between the work performed by respondents and that per-

⁴Another worker, Blundo, who was injured while checking cargo being stripped from a container which had been previously unloaded from a vessel and then transported overland to the place of injury (432 U.S. at 253), was also held to be covered.

The instant case does not present any question of coverage for an employee engaged in stuffing or stripping containers or in clerical work which is part of the loading or unloading process. Employees so engaged are, according to the teaching of *Northeast Marine*, clearly covered by the 1972 amendments.

formed by Caputo. In each instance, the injured employee was engaged in maritime employment.⁵

2. It is true, as the Court observed in *Northeast Marine, supra*, at 265, that the failure of Congress to define the relevant terms has made more difficult the task of applying them to these situations. However, "we are not without guidance in resolving that question" (*ibid.* at 268).

A. In determining that Blundo, who was injured while checking cargo being stripped from a container which had been trucked overland by an independent trucking company to the place of the accident, and Caputo, who was injured while helping a consignee's truckman load his truck, were both covered by the Act, the Court found such "guidance" in, *inter alia*, the fact that "[t]he language of the 1972 Amendments is broad and suggests that we take an expansive view of the extended coverage"—a construction which, it remarked, is "appropriate for this remedial legislation"

⁵While it is true that the Court resolved the question for Blundo on the ground that in checking cargo being stripped from a container he was doing precisely the kind of work Congress had in mind in enacting the Amendments (432 U.S. at 269-271), nonetheless, his case, as well as Caputo's, is relevant in helping determine what it is that constitutes maritime employment. The Court held that the fact that the cargo had been trucked overland to the place where Blundo was injured did not destroy the maritime nature of his employment.

"We find no significance in the fact that the container Blundo was stripping had been taken off a vessel at another pier and then moved to the site of the injury. Until the container was stripped, the unloading process was clearly incomplete." *ibid.* at 271, n. 33

The Court also noted that

"... the consignee's delay in picking up the cargo has no effect on the character of the work required to effectuate the transfer of the cargo to the consignee. The work performed by the longshoreman is the same whether performed the day the cargo arrives in port or weeks later." *ibid.* at 274, n. 37

(*ibid.*). There is no reason why this basic approach to the amendments should not be applied in the instant case.

B. Involved in the legislative decision to extend coverage shoreward was the fact that containerization has moved loading and unloading operation shoreward (*ibid.* at 269-271). That, however, was not the only motivation for the legislation. Another significant factor was the desire to have "a uniform compensation system" applicable to *all* employees who would be covered by the Act for *any* part of their activities (*ibid.* 272).

WHAT IS MARITIME EMPLOYMENT

There are several possible ways of interpreting the 1972 amendments to achieve the Congressional objective for uniformity.

1. One is to examine, as the Court did in *Northeast Marine*, whether or not, on the basis of the totality of his work experience, the injured worker is a "longshoreman" (*ibid.* 273). That approach solved the problem in Caputo's case (thereby rendering it unnecessary for the Court to consider any other questions [*ibid.* at 272]), because "[i]t is clear, *at a minimum*, that when someone like Caputo performs such a task, he is to be covered" (432 U.S. at 273; *italics supplied*). The Court, however, was clearly not delineating the outer limits of coverage for employees engaged in the "old-fashioned" cargo handling processes; nor was it determining the outer limits of the phrase "maritime employment" as used in the amendments.⁶

⁶"... the category of persons engaged in maritime employment includes more than longshoremen and persons engaged in longshoring operations" *Northeast Marine, supra*, 432 U.S. at 265, n. 25.

What was said in relation to Caputo should not, we submit, be converted into a rule which would exclude from "maritime employment" all employees to whom the label "longshoremen" may not be readily applied (see n. 3, *supra*). Like the repudiated "point of rest" theory (432 U.S. at 274-279), such an approach would create a multitude of problems and lead to a proliferation of decisions on all levels which could only result in confusion, in the creation of hairline distinctions and in the inclusion or exclusion of workers based upon a series of conflicting judgments about who is or who is not a "longshoreman". It is doubtful that this approach would result in the uniform compensation system desired by Congress.

2. Another approach, one which has the virtue of simplicity in application and uniformity in result, is that proposed by the Director, Office of Workers' Compensation Programs: the amendments reach "all physical cargo handling activity" anywhere in the situs area, so that "maritime employment" includes "all physical tasks performed on the waterfront . . . necessary to transfer cargo between land and water transportation" (*ibid.* at 272).

While the Court in *Northeast Marine* found it unnecessary to decide whether the Congressional desire for uniformity required the adoption of this view, it is submitted that the Director's approach has much to commend it.

¹*Amicus* suggests that the Director can not have meant to limit coverage to "physical" cargo handling activity alone. The legislative history of the amendments and the Court's decision in Blundo's case make it clear that clerical work like the checking and marking of cargo which is an "integral part" of the loading and unloading process (432 U.S. at 271) is to be covered.

It is not clear, however, whether the Director would apply this proposed test only to the work an employee was doing at the moment of injury or would include in it any work to which the employee could be assigned during the course of his employment. If the former is the case, *amicus* must object to it because it will reintroduce the walking in and out of coverage problem.⁸ If the Director proposes that his criteria be applied to any work to which the employee could be assigned during the course of his employment, *amicus* has no quarrel with him save as noted in n. 7, *supra*.

This test, with the qualification noted, is simple and precise in application. It would obviate, or at least minimize, the necessity for a case by case approach with the inevitable concomitant of conflicting, or finely distinguished, decisions based on varied appraisals of a worker's status as a "longshoreman". It would lay down clear and administratively workable guidelines.

3. Petitioners propose a much more restrictive test:

"On the date of his injury, was the employee subject to being assigned by his employer to perform any part of his work on the navigable waters of the United States." (Brief for Petitioners, 30-31).

First, *amicus* agrees that an employee's coverage ought to depend on whether he is "subject to being assigned by his employer to perform any part of his work" on the situs, rather than limiting inquiry to what he was doing at the

⁸In urging the "point of rest theory", the *Northeast Marine* petitioners

"fail[ed] to give effect to the obvious [Congressional] desire to cover longshoremen whether or not their particular task at the moment of injury is clearly a 'longshoring operation' " 432 U.S. at 276.

precise moment of injury—a limitation which would bring back the anomalous situation in which a worker might be walking in and out of coverage all day long. However, the principal trouble with petitioners' proposed test is that it limits the situs to the "navigable waters of the United States"—a concept which, it is clear, the 1972 amendments specifically rejected by adding to the Act the words "including any adjoining pier, wharf, drydock, terminal, building-way, marine railway, or other area customarily used by an employer in loading, unloading, repairing, or building a vessel. . . ."⁹

Petitioners' test simply ignores the legislative intent to extend the scope of the Act's coverage from navigable waters to adjoining areas as specified in the amendments and would reintroduce the "Jensen line" (*Southern Pacific Co. v. Jensen*, 244 U.S. 205 [1917], which was moved landward by the 1972 amendments. *Northeast Marine, supra*, 432 U.S. at 257-260.

THE PROPOSAL OF AMICUS

It seems to *amicus* that an appropriate test, and one which meets the Congressional desire for uniformity, would be this:

Was the employee subject to being assigned by his employer to perform any part of his work upon the navigable waters of the United States, including any adjoining pier, wharf, drydock, terminal, buildingway, marine railway, or other adjoining area customarily

⁹*Amicus* suggests also that the test not be limited, as petitioners propose, to "the date of his injury". Many workers are hired for longer periods of time—the duration of a job or a fixed weekly period, for example. There is no reason, therefore, why their coverages should be as temporally circumscribed as petitioners suggest.

used by an employer in loading, unloading, repairing or building a vessel.

This provides the uniformity necessary to avoid the walking in and out of coverage problem and it gives effect to Congress' intent that navigable waters include piers, wharves, terminals, and other adjoining areas customarily used (for longshore purposes) in loading and unloading vessels. Such a test is easy of application and should result in uniformity of decision. It is consistent with what the Court said of Caputo: "He could have been assigned any one of a number of tasks necessary to transfer cargo between land and maritime transportation" (432 U.S. at 273) and that to exclude him from coverage "would be to revitalize the shifting and fortuitous coverage the Congress intended to eliminate" (*ibid.* at 274).

CONCLUSION

Because respondents met the test proposed by *amicus*, indeed they were actually performing such work when injured, the judgments below should be affirmed.¹⁰

San Francisco, California,
February 1979.

Respectfully submitted,

Of Counsel:
LEONARD & PATSEY

NORMAN LEONARD
*Attorney for International
Longshoremen's and
Warehousemen's Union,
Amicus Curiae*

¹⁰The result here will not be inconsistent with Judge Gibbon's analysis in *Sea-Land Services v. Director, Office of Workers' Compensation Programs*, 540 F.2d 629 (3rd Cir. 1976), which fixes the point of demarcation at "the interface between the . . . land and the water modes of transportation" (540 F.2d at 638) or ". . . the point when the cargo passes to or from an employer engaged in [maritime commerce] to an employer engaged in [land commerce].", *ibid.* 639. If finely drawn distinctions result from the application of Judge Gibbon's analysis, the test *amicus* proposes will resolve them.

FEB 26 1979

RONALD KODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-425

P. C. PFEIFFER Co., Inc. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

v.

DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents.

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

v.

WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF AMICUS CURIAE OF INTERNATIONAL
LONGSHOREMEN'S ASSOCIATION, AFL-CIO**

THOMAS W. GLEASON
*Attorney for International Longshore-
men's Association, AFL-CIO as
Amicus Curiae*
One State Street Plaza, Suite 2500
New York, NY 10004
(212) 425-3240

Of Counsel

THOMAS W. GLEASON
ERNEST L. MATHEWS, JR.
HERZL S. EISENSTADT

TABLE OF CONTENTS

	PAGE
Introduction	1
POINT I—The express language of the statute, reinforced by other relevant considerations, provides coverage for all persons engaged in handling maritime cargo between the vessel and delivery to or from an inland carrier	3
A. The Statute Itself	4
B. Other Considerations	6
1. Legislative History	6
2. Uniformity of Coverage	8
3. Hazards	9
4. Consistency With Economic Reality	11
POINT II—The test urged by Petitioners should be rejected	13
POINT III—The results achieved below were correct ..	16
Conclusion	18

TABLE OF AUTHORITIES CITED

CASES	
<i>David Crystal, Inc. v. Cunard Steam-Ship Co.</i> , 339 F.2d 295 (2d Cir., 1964), cert. denied, 380 U.S. 976 (1965)	13
<i>I.T.O. Corp. of Baltimore v. Benefits Review Board, etc.</i> , 529 F.2d 1080 (4th Cir. 1975)	5
<i>Jacksonville Shipyards Inc. v. Perdue</i> , 539 F2d 533 (5th Cir. 1976)	16

	PAGE
<i>Matter of New York Shipping Association</i> , 116 NLRB 1183 (1966)	2, 11n
<i>Nacirema Operating Co. v. Johnson</i> , 396 U.S. 212 (1969)	4
<i>Northeast Marine Terminal Co., Inc. v. Caputo</i> , 432 U.S. 249 (1977)	<i>passim</i>
<i>Sea-Land Service Inc. v. Director, Office of Workers' Compensation Programs, etc.</i> , 540 F.2d 629 (3rd Cir. 1976)	17
<i>Southern Pacific Co. v. Jensen</i> , 244 US 205 (1917) ...	14
<i>The Eddy</i> , 5 Wall. 481, 72 US 481 (1866)	13

STATUTES

Longshoremen and Harborworkers' Act, 1972 Amend- ments:	
33 USC 901, et seq.	1
33 USC 902(3)	2, 3, 8
33 USC 902(4)	2
33 USC 903(a)	2, 4
Waterfront Commission Act of New York Harbor, N.Y. Unconsol. Laws (McKinney 1974) §§ 9806, 9905	12

MISCELLANEOUS

1972 U.S. Code, Cong. & Admin. News, p. 4708 ..	7, 8, 11, 15
S. Rep. No. 92-1125, 92nd Congress, 2nd Session ..	10
Legis. Hist. of the Longshoremen and Harbor- makers' Compensation Act Amendments of 1972 ..	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-425

P. C. PFEIFFER CO., INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

v.

DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents.

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

v.

WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF INTERNATIONAL
LONGSHOREMEN'S ASSOCIATION, AFL-CIO

Introduction

In 1972 Congress amended the Longshoremen and Harborworkers' Compensation Act, 33 USC Section 901 et seq., to provide broad, uniform and substantial coverage. In the

instant case, as in related litigation and through other means, longshore employers and their insurance carriers are seeking to limit the scope of this compensation coverage.

As certified collective bargaining representative of longshoremen and employees engaged in longshore operations in the Ports on the Atlantic and Gulf Coasts of the United States,* the International Longshoremen's Association, AFL-CIO (hereinafter "ILA") appears herein as *amicus curiae* to demonstrate to the Court that the language and intent of the 1972 revisions fully warrant the Court's affirmance of the general approach to the Benefits Review Board. This approach gives effect to the Congressional purpose of providing broad coverage for all persons engaged in the immediate port area in the handling of maritime cargo, whether containerized or in break-bulk. The situs of the events herein falls within the ILA's jurisdiction and one of the respondent employees is a member of the ILA.

The facts in the two consolidated cases under review are not in dispute. *Amicus ILA* will rely on the statements set forth by the parties. Each case involves an employee engaged in tasks at the outer perimeter of the deepsea terminal, whose duties at the time of injury did not require him to board a vessel and who was injured while handling cargo whose passage to or from the vessel was not direct. In each case there is no question but that the employer involved was an "employer" within the definition of Section 902(4) of the Act and that the accident occurred within the situs, as newly defined by Section 903(a).

* See, e.g., *Matter of New York Shipping Association*, 116 NLRB 1183 (1966).

POINT I

The express language of the statute, reinforced by other relevant considerations, provides coverage for all persons engaged in handling maritime cargo between the vessel and delivery to or from an inland carrier.

The sole issue in this case is the scope of the employee's status as presently defined by Section 902(3) of the Act. Resolution of that question must, in the first instance, be derived from the words of the statute itself.

The terms Congress used (*viz.*, "longshoremen" and "longshoring operations") are not mysterious phrases requiring laborious definition. History, the realities of the work-a-day world, and common usage all combine to make the words readily understandable. No ambiguity exists which requires resort to other means of interpretation. However, such other means, if employed, would serve only to reinforce the plain meaning of the statute.

Historically, longshoremen have never been limited to merely loading and unloading cargo from ships, nor are they now. Their work includes, among other things, the movement of the cargo around the docks, its sorting according to destination or consignee, and—most important—receipt of cargo from and delivery to inland transportation systems. In short, the historic work of longshoremen has been and remains the virtually all-encompassing handling of ocean-going cargo between the inland carrier and the vessel itself.

In a less mobile technology, this work once occurred relatively close to the ship. With increasing technological flexibility it moved landward, as Congress has recognized in the new situs test. But the *process* throughout remained the same—only geographically and chronologically expanded to the borders of the modern ocean terminal. As

this Court was quick to recognize in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 US 249 at 269-271 (1977), modern technology and improved methods have created great changes within the scope of longshore work. But its essential boundaries—the ship on the one hand and the inland carrier on the other—have persisted. In both intent and express language, the 1972 Amendments extend coverage to all persons engaged in work within those boundaries.

A. The Statute Itself

The 1972 amendments were initially occasioned by a series of decisions which narrowly construed the original Act's coverage to end at the water's edge (e.g., *Nacirema Operating Co. v. Johnson*, 396 US 212 (1969)). However, Congress' approach in amending the statute after 45 years of unmodified existence clearly went beyond simply overcoming the limitations of specific rulings or attempting to provide coverage where no state statute was applicable.* Instead, Congress adopted a whole new approach consistent with what it recognized to be the realities of contemporary maritime transportation.

Whereas previously the location, or situs, of the injury had been determinative, the 1972 amendments recognized that longshore work had moved inward and extended the situs to include not only the "navigable waters" of the United States but also

"any adjoining pier, wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 USC § 903(a)

* Before the amendments, Section 903(a) limited the coverage provided to the Act to situations where "recovery for the disability or death through workmen's compensation proceedings may not be validly provided by state law." This language was deleted in the 1972 version.

Having enlarged the situs to include an area where persons other than those exclusively engaged in maritime operations might be found, Congress added a further "status" test to limit the Act's coverage to those individuals whose regular employment was centered at the situs, but not beyond, and who shared the incidents of employment, risk, and injury.

In defining an employee covered by the Act, Congress deliberately employed the widest possible term, "maritime employment". It expressly included within that definition all "longshoremen or other persons engaged in longshoring operations . . .". The complete breadth of the term "maritime operations" is not at issue in this case, which is limited to the more precise terms, "longshoremen" and "longshoring operations".

It should be noted that even in the more descriptive language, Congress consciously chose to use broad, generic terms. It did not limit the Act's coverage to only "longshoremen". It went on to add a clearly wider phrase: "others engaged in longshoring operations." *Amicus ILA* respectfully suggests that this broad terminology is not ambiguous draftsmanship but a reflection of practical reality. It recognizes the dynamic nature of maritime employment and avoids any cut-and-dried classifications which would soon be obsolete. It utilizes the more generic terms so as to avoid the necessity of piecemeal statutory redefinition in the future. It leaves to the Benefits Review Board and to the Courts to determine whether particular employees fall within the generic classifications as such operations are actually carried on now or in the future.

Amicus ILA contends that Congress' use of the term "longshoring operations" is determinative in situations like those under review. See the dissenting opinion of Judge Craven in *I.T.O. Corp. of Baltimore v. Benefits Review Board, etc.*, 529 F.2d 1080, at pp. 1090, 1094-95 (4th

Cir. 1975). Though broad and generic, the term is capable of definition. However much modern technology may move longshore operations landward and however much innovations may add to or alter the precise tasks performed within the industry, "longshoring operations" continue to mean what they have always meant—all handling of cargo between the vessel and the inland carrier. Any attempt to define a dynamic, multi-faceted and constantly changing industry from within, is bound to lead to confusion and obsolescence. Viewed from without, however, "longshoring operations" admits of easy definition. It includes all employees working *vis-a-vis* the movement of maritime cargo. Its limits are defined by the vessel's crew on the one side and the employees of terrestrial carriers on the other. Between these two boundaries, all persons handling the cargo are engaged in longshore operations, no matter what new or different tasks are required by the present state of the craft.

The coverage of the statute is clearly stated. The only confusion results from obfuscation introduced by persons like Petitioners, who wish to limit its applicability. They attempt to introduce an ambiguity where none exists so as to impose a more restrictive test, at variance with life on the waterfront. However, as demonstrated below, resort to the customary aids of interpretation actually serves to reinforce the fact that, when Congress used the term "longshoring operations", it meant exactly what it said.

B. Other Considerations

1. Legislative History.

The Committee Report makes it very clear that Congress recognized the inland thrust and scope of longshore activities. The Committee said:

"To take a typical example, cargo, whether in break-bulk or containerized form, is typically unloaded from

the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injury sustained by them . . ." (1972 US Code, Cong. & Admin. News, at p. 4708)

Indeed, the outstanding feature of the 1972 amendments is the redefinition of "navigable waters", to include the adjoining land area.*

Congressional perception of the nature of longshore work, however, is not new. This Court noted in the *Caputo* case, (432 US 249 at p. 257, fn. 12), that, as long ago as 1922, Congress had recognized that

"[t]he work of longshoremen is not all on ship. Much of it is on the wharfs. They may be at one moment unloading a dray or a railroad car or moving articles from one point on the dock to another, the next actually engaged in the process of loading or unloading cargo. Their need for uniformity is one law to cover their whole employment, whether directly part of the process of loading or unloading a ship or not."**

With the 1972 amendments, Congress has finally provided such uniform coverage. The limits of that coverage are set forth both in the statute itself and in the legislative report. On the seaward side, the statute specifically exempts

"a master or member of a crew of any vessel or any

* It would seem that, as used in the 1972 version of the Act, "navigable waters" is no longer a matter of geography but has become a term of art, embracing the entire area described in the inclusion. That area may best summarily be described as "where longshoring operations take place".

** Significantly, the two examples given by Congress—a dray or railroad car—are precisely the vehicles with which the employees herein were involved at the time of their injuries.

person engaged by the master to load or unload or repair any small vessel under eighteen tons net". 33 USC Section 902(3).

On the landward side, the Committee Report continues:

"Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered...." (1972 US Code Cong. & Admin. News at p. 4708)

Between these two lines, Congress sets no limits. Neither the statute itself nor the committee report suggests the exclusion of any person *actually handling the cargo* from those who would be engaged in "longshoring operations." Merely peripheral workers, like clerks, who do not participate in the on-hands work and attendant dangers of cargo handling are not covered. 1972 U.S. Code Cong. & Admin. News at p. 4708.

2. Uniformity of Coverage.

Congress expressed its intent

"to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." (ibid.)

In providing uniformity, Congress performance went beyond the earlier problems occasioned by the "water's edge" limitation. By defining the employees covered to be all those engaged in "longshore operations", Congress did more than merely adjust the situation of a single individual walking in and out of coverage, depending on whether he was injured on ship or on land. The goal of uniformity does not necessarily extend only to covering an employee, no matter what particular phase of longshoring operations he may be engaged in at the moment of injury. It likewise extends to uniform coverage of all employees at the *situs who are doing the same work*. And it extends to providing

the same coverage to like employees in various ports, no matter what the particular local arrangement may be.

Thus, the nationwide application of the Act requires the broad, generic interpretation of the term "longshore operations" Respondents urge. For reasons of history and convenience, each port differs in the manner in which cargo is loaded and unloaded from ships. In some ports, gangs may be interchangeable, subject to working anywhere from shipboard to the farthest reaches of the terminal. Other ports are more structured, and individuals are limited in their tasks and areas. Any approach which uses a test grounded in function or geography is bound to exclude in some ports individuals who would be covered under the *modus operandi* in other ports. Yet all the individuals are engaged in the same longshoring operations. The inevitable result of any attempt to pick and choose among them will set the stage for inequality, uncertainty and reams of litigation in the years to come.

3. Hazards.

In providing more adequate compensation for longshoremen and harborworkers, Congress was particularly sensitive to the hazardous nature of these occupations. Its underlying recognition of the "unsafe conditions" in this "high-risk occupation" (shared no less by Ford and Bryant than by Caputo and Blundo) and its desire to promote employer and employee incentives to reduce the dangers and costs of handling maritime cargo can both be seen from the following introductory passage from the Report of the Senate's Labor and Public Welfare Committee:

'Safety

It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, by assuring that the employer bears the cost of un-

safe conditions, serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety.

This consideration is particularly crucial with respect to high-risk occupations such as those covered by this Act. *Longshoring, for example, has an injury frequency rate which is well over four times the average for manufacturing operations.* It is the Committee's view that every appropriate means be applied toward improving the tragic and intolerable conditions which take such a heavy toll upon workers' lives and bodies in this industry, and such means clearly include vigorous enforcement of the Maritime Safety Amendments of 1958 and the Occupational Safety and Health Act of 1970, as well as a workmen's compensation system which maximizes industry's motivation to bring about such an improvement." S. Rep. No. 92-1125, 92d Congress, 2d Session (accompanying S. 2318), at 2; Legis. Hist. of the Longshoremen and Harborworkers' Compensation Act Amendments of 1972 at p. 64. (Emphasis supplied)

Later in the Report, the Senate Committee stated:

"The Committee recognizes that progress has been made in reducing injuries in the longshore industry, but longshoring remains one of the most hazardous types of occupations." *Id.* at 12; Legis. Hist. of Amendments, at 74.

Congress did not distinguish among classifications of persons subject to the hazards and high-risks of longshoring operations on the newly defined situs. It manifestly wished to provide a uniform coverage to all persons subject to like threat of harm. The hazardous nature of longshore operations is directly related to the handling of maritime cargo. It certainly does not diminish as one retreats from the water's edge. All employees whose duty

it is to work with such cargo at the terminal are subject to identical hazards and are to be afforded the same coverage. While it is true that, at the outermost perimeters of the terminal, employees of the inland carrier may for a brief period come within the danger zone, their exposure exists for but a fraction of their work-day, that is, for only the time they spend at the docks transferring cargo to and from the longshore employees. The latter, however, are always at the terminal and are constantly subject to the risks of maritime operations, which motivate coverage. Congress perceived and recorded this demarcation when it excluded coverage for employees "whose responsibility is only to pick up stored cargo for further trans-shipment" inland. 1972 U.S. Code, Cong. & Admin. News at p. 4708.

4. Consistency With Economic Reality.

The fact is that longshoring operations cover a plethora of diversified activities. Any attempt to limit coverage of the Act by listing such activities or by a hidebound test would be doomed both to future obsolescence and to failure to meet the realities of some particular terminal operation. The scope of longshore operations have been recognized in various other contexts. Thus, the National Labor Relations Board's certification of *amicus* ILA in the Port of New York contains a description of the varied activities that fall within that unit.* Similarly, the Waterfront Commission Act of New York Harbor, as noted by this Court in *Caputo* at 432 US at p. 269, fn. 30, describes long-

* "All longshore employees engaged in work pertaining to the rigging of ships, coaling of same, loading and unloading of cargoes, including mail, ships' stores and baggage, handling lines in connection with the docking and undocking of ships including hatch bosses, cargo repairmen, checkers, clerks and timekeepers and their assistants, including head receiving and delivery clerks; general maintenance, mechanical and miscellaneous workers; horse and cattle fitters, grain ceilers and marine carpenters, in the Port of Greater New York and vicinity. . . ." *Matter of New York Shipping Association*, 116 NLRB 1183 (1966) at p. 1188.

shoring in equally diversified terms.* The two descriptions mentioned, of course, arose in other contexts and are not urged by *amicus* to be controlling in the case at bar. However, both are based upon the realities of longshoring operations and are instructive in showing the wide range of activities which fall within that description. An interpretation of the statute to include all handling of the

* "Longshoreman" shall mean a natural person, other than a hiring agent, who is employed for work at a pier or other waterfront terminal, either by a carrier of freight by water or by a stevedore

"(a) physically to move waterborne freight on vessels berthed at piers, on piers or at other waterfront terminals, or

"(b) to engage in direct and immediate checking of any such freight or of the custodial accounting therefor or in the recording or tabulation of the hours worked at piers or other waterfront terminals by natural persons employed by carriers of freight by water or stevedores, or

"(c) to supervise directly and immediately others who are employed as in subdivision (a) of this definition." N.Y. *Uneconsol. Laws* (McKinney 1974) Section 9806.

Section 9905 provides supplementary definitions:

"(6) 'Longshoreman' shall also include a natural person, other than a hiring agent, who is employed for work at a pier or other waterfront terminal

"(a) either by a carrier of freight by water or by a stevedore physically to perform labor or services incidental to the movement of waterborne freight on vessels berthed at piers, on piers or at other waterfront terminals, including, but not limited to, cargo repairmen, coopers, general maintenance men, mechanical and miscellaneous workers, horse and cattle fitters, grain ceilers and marine carpenters, or

"(b) by any person physically to move waterborne freight to or from a barge, lighter or railroad car for transfer to or from a vessel of a carrier of freight by water which is, shall be, or shall have been berthed at the same pier or other waterfront terminal, or

"(c) by any person to perform labor or services involving, or incidental to, the movement of freight at a waterfront terminal as defined in subdivision (10) of this section." N.Y. *Uneconsol. Laws* (McKinney 1974) Section 9905.

cargo at the situs by persons other than those employed by the vessel, on the one hand, and the inland carrier, on the other hand, would be consistent with the view of longshoring operations taken by these other governmental agencies.

Such an interpretation is likewise consistent with the general law of maritime transportation, which holds that the goods are in the custody of the vessel carriers (i.e., the ultimate employers of longshoremen) until such time as they are actually delivered to agents of the inland carrier. *David Crystal, Inc. v. Cunard Steam-Ship Co.*, 339 F.2d 295, 298 (2nd Cir. 1964), cert. denied, 380 US 976 (1965). See, e.g., *The Eddy*, 5 Wall. 481, 495, 72 US 481, 495 (1866).

The various considerations which might be helpful in interpreting the Act—even if it were not clear on its face—all ultimately turn on what actually goes on in the ports. In sum, they reinforce the construction urged by *amicus* that, in using the generic term "longshore operations", Congress intended to cover all employees at the situs engaged in handling maritime cargo, notwithstanding their particular function or locus therein.

POINT II

The test urged by Petitioners should be rejected.

Petitioners, understandably, are interested in limiting the Act's applicability. The test they propose suffers from three disqualifications. It reintroduces, albeit in a more limited, modified form, the "water's edge" approach Congress expressly sought to do away with. It would create a bifurcation of coverage between employees handling break-bulk and containerized cargo. And it usurps the prerogative of Congress, by legislating the more restrictive qualification "amphibious", which Congress did not include within the Act. Having not succeeded (in *Caputo*) with

"point of rest," they return to this tribunal with another test designed to frustrate the fair import of the amendments.

The test proposed at pages 30-31 of Petitioners' brief would make coverage of the Act depend on whether handlers of break-bulk cargo were subject to being assigned to shipboard activity. The test would seem to be deliberately designed to limit coverage of the Act to the extent already declared by this Court in the *Caputo* case. It overlooks the fact that in deciding *Caputo*, the Court expressly recognized it was dealing with *minimal* coverage and in no way claimed to be setting definitive limits. See 432 US at 273.

Petitioners' test would preserve, in thin disguise, the old "water's edge" line of *Southern Pacific Co. v. Jensen*, 244 US 205 (1917). This would emasculate the essential thrust of the legislation, which is premised on Congress' recognition that such a demarcation is obsolete. By requiring that the employee be subject on the date he was injured to being assigned to tasks literally over the "navigable waters," Petitioners would reintroduce the old problem of walking in and out of coverage—perhaps not on the same day but in the course of some other period of time. Again, coverage would become "fortuitous". Such a test would simply ignore what is perhaps the outstanding feature of the 1972 amendments—the clear recognition that maritime operations do not end at the water's edge.

Moreover, by introducing a separate test for employees handling break-bulk cargo, Petitioners would continue the bifurcated coverage Congress intended to eliminate. This Court's holding in *Caputo* recognized a Congressional intent to cover a maritime employers' employees working with containerized goods, no matter where on the terminal their injuries may have occurred. Petitioners' test would limit the broad scope of the 1972 Amendments solely to employees who deal with containers, while minimizing the coverage to break-bulk employees. The wording of the Act

and the legislative history give no hint that Congress intended a different coverage depending on whether an individual was handling break-bulk or containerized cargo. Modern cargo handling techniques are not limited to containerization. They apply also to the manner in which break-bulk cargo is handled. The application of principles like division of labor or "assembly line" methods have altered the traditional manner of performing even historic tasks. Recognition of this economic fact of life is implicit in the Committee report when it explicitly discusses "cargo whether in break-bulk or containerized form" (1972 U.S. Code, Cong. & Admin. News at p. 4708) (emphasis added).

By seizing on the word "amphibious", used by this Court to characterize the longshoremen injured in *Caputo*, Petitioners attempt to legislate a more restrictive term into the statute than Congress chose to do. Had Congress merely intended that the new coverage of the Act extend to employees who are assigned or subject to assignment to shipboard operations, this amendment of the Act would have taken a far different form. Indeed, the very term borrowed by Petitioners from this Court's decision—the word "amphibious" (or a similar term of like meaning)—was available to Congress. It is so readily definitive that its absence from the statute can be taken as to mean that Congress could not have intended such a limited coverage. Petitioners' "amphibiousness" test is as vulnerable as was the "point of rest" theory and should be as promptly rejected.

The very weaknesses of the test proposed by Petitioners argues for the approach urged by *amicus* ILA. The imposition of such a test would be to perpetuate the very shortcomings which the amendments were expressly designed to eliminate and would require, in effect, a legislative act beyond what Congress actually did. This indicates that the statute as written envisions a far broader coverage than Petitioners would admit. Indeed, the issue framed at page 11 of Petitioners' brief as the "ultimate question" which

these cases present and which the Court declined to reach in *Caputo*, is instructive:

"Whether Congress intended the 1972 amendments to the longshoremen's act to cover 'all physical cargo handling activity anywhere within an area meeting the situs test' or only those 'amphibious workers' such as *Caputo* who had no uniform compensation remedy prior to the 1972 amendments?"

It would seem that Petitioners themselves recognize that there are only two alternatives. Either one must impose a test like the one Petitioners urge, with all its anachronisms and drawbacks, or one must hold that the Act means exactly what it says and that all longshoring operations at the situs are covered.

POINT III

The results achieved below were correct.

In its original decision on the cases under review, the Fifth Circuit rather easily found that Respondents Ford and Bryant were engaged in longshore operations, chiefly on the basis that their work was "evidently an integral part of the process of moving maritime cargo from a ship to land transportation," *Jacksonville Shipyards Inc. v. Perdue*, 539 F.2d 533, 543 (5th Cir. 1976). The Fifth Circuit was equally correct on remand in reaffirming its prior decision in the light of *Caputo*. In essence that Court had held that the discontinuity in the passage of cargo from or to the vessel did not deny coverage to Bryant and Ford who handled the goods before and after the discontinuity.

In *Caputo*, this Court recognized that

"... all would agree that persons bringing such cargo directly from a ship to a truck are engaged in maritime employment. . . ."

* * *

"... it is incontrovertible that workers engaged in the process of loading a ship and performing steps analogous to those mentioned in the example—that is, moving cargo from storage and placing it immediately on the ship—are covered. . . ." 432 US at 267, fn. 28.

This Court also decisively rejected the "point of rest" theory. 432 US at 275-278.

In finding that "discontinuity" was a neutral circumstance, the Fifth Circuit did no more than apply these two holdings of *Caputo* to the case at bar. Indeed, it would seem that, once the "point of rest" theory is discarded, any person engaged in the process of moving cargo between the vessel and the inland carrier is engaged in "longshoring operations."

A similar approach was adopted by the Third Circuit in *Sea-Land Service, Inc. v. Director, Office of Workers' Compensation Programs, etc.*, 540 F.2d 629 (3rd Cir. 1976), where the Court said:

"The key is functional relationship of the employee's activity to maritime transportation, as distinguished from such land-based activities as trucking, railroading or warehousing.

* * *

"The line which Congress intended to draw was between maritime commerce and land commerce, and the coverage of the federal law starts at the point where the cargo passes to or from an employer engaged in the former to an employer engaged in the latter." 540 F.2d at 638, 639.

To support the Court below, both the Director and *amicus curiae* International Longshoremen's and Warehousemen's Union have proposed their own "tests" for adoption by this Court to elucidate the meaning of the statute. *Amicus ILA* has no quarrel with the tests framed by the Director and the other *amicus* to the extent that they

would provide the kind of wide coverage Congress intended. *Amicus ILA* does, however, suggest that the very notion of a "test" is unnecessary in the light of the statutory language. It runs the risk of failing to meet the actual situation in particular ports and of becoming obsolete as the industry evolves. Rather than imposing a test, this Court should adopt an approach whereby the Board and the lower courts can scrutinize individual cases from the point of view of longshoring operations as delineated by the employees of the vessel, on the one hand, and of the inland carrier, on the other.

Conclusion

In the cases under review, the Respondent employees were engaged in longshoring operations in that they were handling maritime cargo between the vessels and the overland carriers. The Judgments below should be affirmed.

New York, New York
February 14, 1979

Respectfully submitted,

THOMAS W. GLEASON
Attorney for International Longshoremen's Association, AFL-CIO, Amicus Curiae

Of Counsel:

THOMAS W. GLEASON
ERNEST L. MATHEWS, JR.
HERZL S. EISENSTADT